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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RONALD FUSCO,

Petitioner,

V.

PERINI NORTH RIVER ASSOCIATES AND HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER 16, 1980

(10248)

QUESTIONS PRESENTED

(1) Whether a construction worker engaged in the construction of a sewage plant to eliminate pollution of navigable waters, and whose principal duties are performed on such navigable waters is a "person engaged in maritime employment" within the purview of §902(3) of the Longshoremens and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 et seq.

(2) Whether the 1972 amendments to the Longshoremens and Harbor Worker's Compensation Act had the effect of depriving water based construction workers of benefits which they would have enjoyed prior to such amendments.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Ronald Fusco, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit entered on June 4, 1980.

The original judgment and opinion of the Court of Appeals for the Second Circuit entered on June 29, 1979 (Fusco et al v. Perini North River Associates, et al, 601 F.2d 659), set aside the order of the Benefits Review Board dated November 30, 1978, denying coverage to petitioners Fusco and Sullivan under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901 et seq.

Thereafter, this Court, in Perini North River Associates v. Fusco, Sup. Ct. of U.S. Oct. Term 1979 No. 79-759 January 14, 1980, 100 Sup. Ct. 697 (1980), vacated the judgment of the Court of Appeals for the Second Circuit and remanded the case to the Court of Appeals for "further consideration in light of P.C. PFEIFFER CO. v. FORD, 444 U.S. 69" (Nov. 27, 1979).

The Court of Appeals for the Second Circuit in its decision of June 4, 1980 (Fusco et al v. Perini North River Associates, et al, 622 F.2d 1111), on the basis of the reasoning in P.C. Pfeiffer Co. v. Ford (infra) denied the petitions of Fusco and Sullivan and affirmed the Benefit Review Board's November 30, 1978 order denying coverage to petitioners.

Petitioner Ronald Fusco seeks the issuance of a Writ of Certiorari to review the ruling of the Court below on the issue of coverage under the Act.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, hereinafter "App. A.") is dated June 4, 1980 and reported at 622 F.2d 1111. A timely petition for rehearing and rehearing en banc was denied by order dated August 19, 1980 (App. B). The order is contained in the published opinion. The order of this Court dated January 14, 1980 remanding the case to the Court of Appeals for further consideration (App. C) is reported at 100 S. Ct. 697 (1980). The original opinion of the Court of Appeals (App. D) is dated June 29, 1979

and reported at 601 F.2d 659, as is its decision denying rehearing and rehearing en banc dated August 21, 1979 (App. E). The decision of the Benefits Review Board of the Department of Labor and dissenting opinion of Member Miller dated November 30, 1978 and January 19, 1979, respectively (App. F) is reported at 9 BRBS 378.* The Administrative Law Judge decision in the case of Ronald Fusco was filed on December 28, 1977 and reported at 76 LHCA 97 (App. G). The Administrative Law Judge decision in the case of Bernard Sullivan was filed on August 26, 1977 and reported at 77 LHCA 85 (App. H).

*The Benefits Review Board Service (BRBS) is the unofficial reporter of the Board's decisions. The LHCA reports are also contained in the BRBS.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1980. On August 19, 1980 the Court of Appeals denied Petitioner Sullivan's timely Petition for Rehearing and Rehearing En Banc.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 902(3) of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §902(3) (1970 ed. and Supp. V is set forth as Appendix I.

Section 1251(a)(1)(2) of the Federal Water Pollution Control Act is also set forth in Appendix I.

STATEMENT OF THE CASE

The Facts

On January 8, 1975, the petitioner, Ronald Fusco, was 29 years old and had been employed as a laborer by Perini North River Associates for about two years. (5)*

Perini North River Associates was engaged in the construction of the foundation of a sewage treatment facility at a site on the Hudson River, a navigable waterway of the United States, in the vicinity of West 138th Street, Borough of Manhattan, City of New York.

*Where preceded by " A " the numerical references herein are to pages of the Joint Appendix. Other numerical references pertain to pages of the transcript of the proceedings before the Administrative Law Judge in Fusco v. Perini.

The project, entitled the North River Pollution Control Project, had been contracted by the City of New York in 1971 or 1972, with financing wholly or in part by the United States Environmental Protection Agency. Its purpose was to eliminate pollution in the navigable waters of the Hudson River (110, 123), and had been made possible by the Federal Water Pollution Control Act (33 USCS § 1251 et seq) which authorized Congress to provide Federal Funds to municipalities for the erection of such facilities.

The national policy expressed in the Act was to eliminate the discharge of pollutants into the navigable waters, and to achieve water quality providing for "the protection and

propagation of fish, shell fish and wildlife and [provide] for recreation in and on the water." (§1251(1)(2))

In connection with the construction of the substructure of such facility, Perini's employees were driving caissons into the river bed and building a concrete pier on top of the caissons. (8, 10, 122, 123)

After completion of the concrete pier or substructure by Perini, the plans called for the erection of the sewage treatment facility to be situated upon the concrete pier.

On the river side (or West side) of the gradually expanding pier, Perini owned, operated, maintained and moored five rotary drill barges, two churn drill barges and seven or eight supply barges. It also owned

and operated two small tug boats which it used to position the barges. (124, 125)

In addition to the fourteen or fifteen large barges and tug boats, a number of smaller vessels called "float stages" were also employed on the job. These were wooden rafts approximately six feet in width by fifteen feet in length, constructed of 12 by 12s. The "float stages" contained no engine and no oars. The men occupying these rafts would pull themselves along the water from caisson to caisson by holding onto pieces of steel welded across the tops of the caissons. These vessels during high tide were used to transport equipment of the dock builders from the shore to each working site, and from one

working site to another. (11, 12, 13, 14, 126, 127)

Petitioner, Ronald Fusco, was a laborer and a member of Local 731 of the Laborers Union. His primary function, during the two years of his employment at the job site, was to assist the dock builders, the men actually installing the pier on top of the caissons. In aiding the dock builders, the petitioner performed several specific tasks. The first of such duties was to transport required tools and equipment from the warehouse on the shore to the working sites, and thereafter from site to site. The dock builders were usually working on the grillage above the caissons or on forms suspended from the grillage. If the tide was

low, or if the working site was quite close to the shore, the petitioner would transport such tools and equipment by carrying them across the grillage on foot. If the tide was high, he would deliver the equipment by using one of the rafts or "float stages", pulling himself across the water to the working site and handing the equipment up to the dock builders on the grillage. At the end of each working day, the tools and equipment used during that day were returned to the warehouse by the same means of transportation.

In addition to transporting equipment thereon, Fusco assisted the dock builders by utilizing the "float stages" to perform work on the underside of the pier and other portions

thereof, which were accessible only by use of such "float stages". (4, 5, 11, 14, 85)

Significantly, during the two years of his employment, with small exception, the petitioner spent some time during each and every day, on one of the above described "float stages". At the same time, following the directions of his employer, he wore a life jacket while performing his work. (15)

In addition to his duties on the "float stages", the petitioner was also called upon to perform work on the barges owned by Perini. On several occasions during his employment, he was directed to and did enter the holds of such vessels to repair leaks. (16, 17, 18)

Petitioner Fusco also assisted the dock builders in working on the caissons embedded in the river bed. When it proved necessary to cut down a caisson, the dock builders would use a torch to reduce the metal exterior, and he would empty the interior with a pick and shovel, or pneumatic drill. Another of the petitioner's duties was to help assemble the concrete forms hanging from the grillage. Such forms were suspended over the surface of the river. (18, 19, 20, 21, 22, 23)

The accident occurred at about 2:30-3:00 p.m. on January 8, 1975. Fusco was assisting a crew of dock builders working over the river, at a point on the pier some 200 to 300 feet from the shore, between West 138th and West 140th Streets. They

were involved with some forms suspended from steel beams, affixed to vertical beams imbedded in the caissons. Fusco, positioned atop of the grillage above the forms, was carrying air hoses for an impact drill being used to tighten the clamps on the grillage from which the forms were hung. The particular form at the accident site was a metal one about 8 1/2 feet in width by 4-6 feet in depth. While Fusco was descending an unsecured crude wooden ladder of "two by fours" into the form, the ladder partially turned, spinning him to his right and into the form. His head struck the beam, upon which the ladder rested, his helmet fell off and he fell to the bottom of the form. (26, 27, 28, 57, 58, 59, 60, 61, 93).

THE PROCEEDINGS BELOW

Fusco filed a claim for benefits under the Longshoremen's and Harbor Worker's Compensation Act, as amended 86 Stat. 1251, 33 U.S.C. §901, et seq. (1970 ed., Supp. V). Perini controverted the claim, raising inter alia the issue of coverage.

A formal hearing was conducted by Administrative Law Judge Philip Lesser who awarded benefits to Fusco holding that he was engaged in maritime employment and thus covered under the Act. Ronald Fusco v. Perini North River Associates, Case No. 76-LHCA-927 (App. G).

Another Administrative Law Judge rejected the claim of Bernard Sullivan, a Perini employee, injured in a separate accident at the site of the North River Pollution Control Project.

Bernard Sullivan v. Perini North River Associates, Case No. 77-LHCA-85 (App. H).

On appeal, the Benefits Review Board consolidated the above claims with two other cases arising out of the North River Pollution Control Project, since they involved common questions of law and fact. By majority decision dated November 30, 1978, member Miller dissenting and rendering a separate opinion, the Board affirmed the Administrative Law Judge decision in Sullivan and reversed the decision in Fusco. In denying coverage under the Act, the Board specifically held that none of the claimants were engaged in maritime employment as required by §902(3) of the Act (App. F).

Fusco and Sullivan filed Petitions for Review of the Board's Order in the United States Court of Appeals for the

Second Circuit. The Director, Office of Workers' Compensation Programs also petitioned the Second Circuit for review of the Board's decision in the four consolidated cases. In reversing the decision of the Benefits Review Board, the court rejected the occupational test of "maritime employment". The court stated: "[W]e interpret the critical phrase "person engaged in maritime employment" geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972." Fusco v. Perini North River Assoc., 601 F.2d 659,669 (2nd Cir. 1979) (A29). Under this interpretation, the court held that Fusco and Sullivan were persons engaged in maritime employment and hence, covered employees under §902(3) of the Act. The court also held that the

Director, Office of Workers' Compensation Programs lacked standing to petition for review under 33 U.S.C. §921(c) and dismissed his petition. 601 F.2d at 670 (A-30).

After the Second Circuit opinion was issued on June 29, 1979, Perini North River Associates and Hartford Accident and Indemnity Company filed a timely petition to the Second Circuit Court of Appeals, requesting rehearing and rehearing en banc. The Petition for Rehearing and Rehearing En Banc was denied on August 21, 1979. 601 F.2d at 670 (A-33).

Perini and Hartford thereupon petitioned this court for a Writ of Certiorari to review the determination of the Court of Appeals and on January 14, 1980 the following order was entered:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of P.C. Pfeiffer Co. v. Ford, 444 U.S. ____ (1979). Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun dissent." Perini North River Associates v. Fusco, 100 S. Ct. (1980) 697 (A-8).

The Court of Appeals thereupon rendered another decision on June 4, 1980 wherein by virtue of its own interpretation of this court's reasoning in P.C. Pfeiffer Co. v. Ford, it denied the petitions of Fusco and Sullivan and affirmed the decision of the Benefits Review Board.

The Benefits Review Board denting coverage under the Act on the ground that "the claimant's activities had nothing significant to do with navigation and commerce on navigable

waters." Fusco v. Perini North River Associates, 622 F.2d 1111 (2nd Cir. 1980) (A-5).

Petitioner Sullivan thereupon filed a timely petition for rehearing and rehearing en banc which was denied on August 19, 1980. (A-7)

REASONS FOR GRANTING THE WRIT

The instant petition squarely presents this court with the question of whether a construction worker engaged in the construction of a sewage plant to eliminate pollution of navigable waters and whose principal duties are performed on such navigable waters meets the occupational requirements defined by this court in P.C. Pfeiffer Company Inc., et al v. Ford, et al (decided November 27, 1979), 444

U.S. 69, for coverage under the Longshoremen's and Harbor Worker's Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. § 901 et seq. (1970 ed., Supp. V). Moreover the decision below, denying coverage under the Act to such a construction worker, is in conflict with the recent decisions of the U.S. Court of Appeals for the Fifth Circuit in Odom Const. Co. v. Dept. of Labor (decided July 21, 1980), 622 F.2d 110, and the Fourth Circuit in Brown & Root Inc. v. Joyner (decided October 26, 1979), 607 F.2d 1087) wherein coverage was held to apply to construction workers engaged in activities similar to those tasks performed by the petitioner herein. The decision below further raises the question of whether the 1972 amendments to the Longshoremen's and Harbor

Worker's Compensation Act and the effect of depriving previously covered water based construction workers of benefits which they would have enjoyed under the pre-1972 law.

The questions raise important, basic issues of statutory construction, the resolution of which are essential for the effective administration of the Act.

POINT I

THE NATURE OF PETITIONER FUSCO'S ACTIVITIES CLEARLY CAST HIM IN THE ROLE OF "MARITIME EMPLOYEE" WITHIN THE PURVIEW OF §2(3) OF THE LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT.

In P.C. Pfeiffer Company, Inc., et al v. Ford, et al (decided November 27, 1979), 444 U.S. 69, this Court defined the Act's occupational requirements as follows:

> "The term 'maritime employment' refers to the nature of a worker's activities. Thus, §2(3) uses the phrase 'longshorem[e]n or other person[s] engaged in longshoring operations' as one example of workers who engage in maritime employment no matter where they do their job. [emphasis ours] [p. 78] ********** the language of §2(3) provides that an employee is 'any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker ********** We understand the word 'including' to indicate that 'lonshoring operations' comprise a part of the

> larger group of activities that make up 'maritime employment' [emphasis ours] [p. 77 Note 7]. We do not suggest that the scope of maritime employment depends upon the vagaries of union jurisdiction.********** Instead the crucial factor is the nature of the activity to which a worker may be assigned." [p. 82].

The Court below, in its decision of June 4, 1980 misinterpreted the spirit and intent of this court's holding in Ford when it said:

> "In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant. It is not significant that the plant was being constructed so that sewage would not cause pollution of navigable waters; nor that the claimants performed part or all of their work while upon floating stages or upon barges. The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept - a foundation precluded by the reasoning in the Ford case." Fusco v. Perini (A-5).

In the instant case, Fusco's employer, Perini North River Associates, was engaged in constructing a concrete pier extending some 300 or more feet into and over the navigable waters of the Hudson River. This structure was to hold upon it an anti-pollution facility to be utilized for the express governmental purpose of alleviating pollution in the Hudson River. In furtherance of the work, it maintained a fleet of drill bearing craft, supply barges, two tug boats and numerous rafts or "float stages", which were used on a daily basis for transporting men and material to various working sites on the expanding pier. Perini was manifestly a "maritime employer", as defined in Section 2(4) of the Act, which "defines an employer as one 'any

of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States' as broadly defined by §3(a)." [Ford, supra, at p. 78]

By the same token, the activities assigned to and performed by petitioner, Ronald Fusco, were similarly maritime in nature. During each working day, while regularly transporting equipment by "float stage", conducting repairs on barges, actively assisting in the construction of a pier on navigable waters to house a pollution control facility and while wearing a life jacket as required, Fusco was manifestly performing the role of "maritime employee" within the purview of Section 2(3) of the Act, as defined by this Court in Ford. Moreover, the nature of the work in which

Fusco was engaged was clearly related to the national goals and policy set forth in the Federal Water Pollution Control Act [33 U.S.C.S. §§1251- 1376]. Certainly, when Congress spoke of "the protection and propagation of fish, shellfish"...and "recreation in and on the water" (§1251(2), it meant to deal with the troubles of the fishing industry and the problems of pleasure craft owners who had been severely damaged and inhibited by the pollution of navigable waters. In §1251(4) and §1255 of the Act, Congress, through the Environmental Protection Agency, provided Federal funds to enable municipalities (like the City of New York, in the instant case) to construct such anti-pollution facilities. Such construction manifestly bore a

direct relationship to maritime activities. Significantly, unlike apartment houses or other dwellings, which might incidentally be erected upon navigable waters for scenic purposes, the sewage treatment facility here could only serve its expressed purpose of eliminating pollution in the Hudson River, if erected upon navigable waters.

Furthermore, the fact that Fusco and his employer, Perini, were engaged in the construction of the concrete pier, upon which the sewage treatment facility was to be later erected, rather than upon the facility itself, has no relevancy when considered in the light of Ford. There, this Court in extending benefits to a warehouseman and a cotton header, held:

> "A worker responsible for some portion of that activity [moving cargo directly from ship to land transportation] is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." [emphasis ours] [pp. 82, 83].

Following the same line of reasoning, Fusco, although employed only upon the foundation of the sewage treatment facility, was as much an integral part of the process of erecting the entire facility as if he had participated in the construction from foundation to roof.

Similarly, the fact that Fusco was neither a longshoreman nor a member of a maritime union is not dispositive of his status under the Act. Clearly, his daily tasks "comprise[d] a part of the larger group of activities that make up 'maritime employment'." [Ford, supra, p. 77, Note 7].

While the ultimate purpose of the North River Pollution Control Project, upon which Fusco was employed, did in fact bear a significant relationship to maritime activities, coverage under the Act should not, as viewed by the court below, be predicated solely upon the expressed, ultimate goals of the project, with no consideration whatsoever of the activities engaged in by the individual workers employed thereon.

When this Court in Ford (supra, p. 78), said "The term 'maritime employment' refers to the nature of a workers activities" it clearly meant that the issue of coverage in each case should be determined by an examination of the principal duties performed by the employee claiming such

coverage. Nothing contained in such opinion imposed a further limitation upon coverage, by requiring that a construction worker engaged in maritime activities, be employed upon a construction project with an undisputably maritime purpose.

Member Miller of the Benefits Review Board, in his dissenting opinion (A-79) also viewed the issue of coverage as unrelated to the ultimate purpose of the project when he said:

> "In these four cases the claimants were all engaged in employment over navigable waters which involved job functions and responsibilities virtually identical to those performed by workers involved in the construction of docks, piers, wharves, bridges and other structures over and upon navigable waters. Indeed, two of the claimants were described, and accurately I believe, as dock builders. Each claimant was exposed to the same type of risk and hazard and subjected to a type of accident similar to

> that experienced by other maritime workers over navigable waters. In similar situations, the Board has held that the employees were covered. See, e.g., Hed v. Duncanson-Harrelson Co., 7 BRBS 821, BRB No. 77-260 (Feb. 24, 1978); Hunter v. Duncanson-Harrelson Co., 8 BRBS 83, BRB No. 77-433 (March 30, 1978); Hatchett v. Duncanson-Harrelson Co., 8 BRBS 173, BRB No. 77-487 (April 24, 1978)."

The Second Circuit, in denying coverage overlooked the irrefutable fact that the activities, and particularly the risks inherent in and to the performance of such tasks, of a construction worker engaged in the erection of a structure over water, markedly differ from those duties and attendant hazards associated with construction upon land. Here, the very nature of the work, and the manner in which it was performed, consisting of construction of a pier on navigable waters, and necessitating

the utilization of float stages (rafts) and the wearing of life jackets reveals, that the activities engaged in by Fusco on a daily basis were in and of themselves maritime in nature. By artificially distinguishing "locus" from "activities" to deny coverage, the Court below implied that employees can have regularly assigned duties that are performed on water which are not in any sense maritime. In Ford, this court gave no indication that it would adopt such a physically untenable approach in applying the Act to water based employment nor does the Act itself suggest such a construction.

The Court below in affirming the decision of the Benefits Review Board, scrupuously ignored the maritime nature of the activities engaged in by Fusco

and Sullivan and declined coverage on the premise that "They were engaged exclusively in constructing a sewage disposal plant", Fusco v. Perini (A-5)*.

This restrictive distinction proposed by the Second Circuit directly contravenes both the spirit and intent of the Act as defined in this Court in Caputo/Blundo p. 273 (supra) viz.:

*NOTE. The majority of the Benefits Review Board in Matson v. Perini North River Associates, 78 LHCA 693 (September 15, 1978) extended coverage to a Perini employee working on the same North River Pollution Control Project as Fusco. At the time of their respective injuries, Fusco was working on the pier constituting the actual substructure of the sewage disposal plant while Matson was involved in the construction of a pier for the docking of barges upon which the processed sludge from the same sewer plant was to be loaded.

> "Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity."

The effect of the decision appealed from is to make coverage dependent not upon an employee's activities but upon his employer's assignment policies. Such reasoning was expressly rejected by this Court in Ford (supra), p. 83 when it said:

> "Congress intended to apply a simple, uniform standard of coverage. Adoption of the petitioners' test would conflict with that goal, because any individual worker's coverage would depend upon the assignment policies of his employer. For example, a land-based worker would be covered if his employer allowed him to alternate assignments with co-workers who work on the water, but he would not be covered if the employer never allowed him to board a ship. Congress

> did not intend the Act's coverage toshift with the employer's whim."

In Odom Construction Co. v. U.S. Dept. of Labor, 622 F.2d 110, decided July 21, 1980, the United States Court of Appeals for the Fifth Circuit interpreted this court's reasoning in Ford to apply coverage under the Act to a normally land-based construction worker engaged in a two-day job that required moving concrete blocks located on the bank of a navigable canal and where approximately 20% of his employer's work involved bulk heading and pile driving in navigable waters, viz.:

> "First, the act of moving the blocks is maritime work. Section 902(3) lists harbor-workers among the types of workers covered. It is at least arguable that the repair of moorings, even of those not adjacent to main docks, is a type of job that could be performed by a typical harbor-worker. Yet we need not hold

> that Maze was engaged in "harbor-working" at the time of his injury, for § 902(3) by its own terms states that longshoremen and harborworkers are not the only persons engaged in maritime employment. Cf. P. C. Pfeiffer Co. v. Ford,
>
> * * * * *
>
> Where, as here, the claimant was doing maritime work that required him to go into the water and where a significant part of the employer's overall work, 20%, was maritime, the policy of the Act strongly favors coverage."

In the case at bar, 100% of Perini's work involved driving caissons into the river bed and building a concrete pier on top of the caissons (3, 10, 122, 123). Perini was thus far more of a maritime employer than Odom. Similarly, Fusco who during the two years of his employment, with small exception, spent some time during each and every day on "float stages" wearing a life jacket (15) was far more of a maritime employee than

Maze who only spent two days on water.

It requires a strained interpretation of this court's opinion in Ford wherein it extended benefits to land-based workers such as a warehouseman and a cotton header to perceive an intention to deny the same coverage to a manifestly water-based employee like Fusco.

POINT II

PETITIONER FUSCO WOULD HAVE BEEN COVERED UNDER THE PRE-AMENDMENT STATUTE. THE PURPOSE OF THE AMENDMENT WAS TO EXPAND COVERAGE, AND NOT TO EXCLUDE PREVIOUSLY COVERED EMPLOYEES.

In Calbeck v. Travelers Insurance Company, 370 U.S. 114, 117 (1962), this court defined pre-amendment coverage as follows:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."

In Peter v. Arrien, 325 F. Supp. 1361, 1365 (1971), affirmed 463 F.2d 252 (Third Circuit), a pre-1972 case, the District Court in determining which employees come within Section 2(3) of the Act held, as follows:

> "Section 3 of the Longshoremen's Act, 33 U.S.C. § 903 contains no reference to 'maritime employment'. Rather that language is contained in Section 2(4) of the Act, 33 U.S.C. § 902 (4) which defines an employer as 'an employer any of whose employees are employed in maritime employment in whole or in part, upon the navigable waters of the United States * * *'. The term 'maritime employment' is directed at the employer and not at the work that the employee is doing. Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953)**
> **********
> **********
> In the case at bar, Reid employed one Joseph Yardley to operate a motorboat for the purpose of transporting men and material to the pier in the middle of the river. This is clearly maritime activity under the Longshoremen's Act. Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 247, 62 S. Ct. 221, 86 L.Ed. 184 (1941)."

In the instant case, Perini was engaged in constructing a concrete pier extending some 300 or more feet into and over the navigable waters of the Hudson River. This structure was to hold upon it an anti-pollution facility to be

utilized for the express governmental purpose of alleviating pollution in the Hudson River. In furtherance of the work, it maintained a fleet of drill bearing craft, supply barges, two tug boats and numerous rafts or "float stages", used on a daily basis for transporting men and material to various working sites on the expanding pier. How else could Perini be described, if not as a "maritime employer" within the purview of the pre-amendment Act, as defined in Peter v. Arrien (supra)?

By the same token, the work of petitioner, Ronald Fusco, was no less maritime in nature than that of his employer. In each working day, regularly transporting equipment by "float stage", performing repairs on barges and actively assisting in the

construction of a pier on navigable waters to house a pollution control facility, while wearing a life jacket as required, clearly cast him in the role of "maritime employee" within the purview of the pre-amendment Act.

In pointing out the pre-amendment coverage, which would have been applicable here, the Administrative Law Judge cogently reviewed analagous situations as follows:

> "But the courts have already held that the term "maritime employment" includes such non-traditionally maritime activities as, for example, the construction of a driver diversion tunnel in connection with the building of a dam (Morrison-Knudsen Co. v. O'Leary, Deputy Commissioner, 288 F.2d 542 (C.A. 9, 1961)), the operation of a crane in connection with the construction of a bridge (Dixon v. Costing, Deputy Commissioner, 238 F. Supp. 25, (D.C. Va., 1965)), and the activities of a steelworker and of a crane operator in dismantling a bridge (Davis v. Dep't. of Labor and Industries, 317 U.S. 249 (U.S. Sup. Ct., 1942) and Peter v. Arrien, Deputy Commissioner, 463 F.2d 252 (C.A.3, 1972). And it has been held by the Benefits

> Review Board in affirming an Administrative Law Judge decision that an engineer was engaged in "maritime employment" while in a scuba diving training program for the purpose of inspecting underwater facilities of a public utility company (Kenneth C. Sharp v. Pacific Gas & Electric Company, 2 BRBS 381, 10/30/75). I have no hesitancy in concluding that a construction laborer who works on a raft to help construct a fixed structure lying directly above the water, is just as much engaged in maritime employment as a marine diver who inspects fixed structures lying below the water." (A-91, 92).

In Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (hereinafter referred to as Caputo/Blundo), this Court held:

> "The language of the 1972 amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed such a construction is appropriate for this remedial legislation. The act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results' VORIS v. EIKEL, 346 U.S. 328, 333 (1953)." (emphasis ours)

In Caputo/Blundo, p. 275 (supra), this court in rejecting the restrictive "point of rest" theory said:

> "This contention that Congress intended to use the point of rest as the decisive factor in the 'status' determination has several fatal weaknesses. First, the term 'point of rest' nowhere appears in the Act or in the legislative history. It is difficult to understand why, if Congress intended to stop coverage at this point, it never used the term. The absence of a term that is claimed to be so well known in the industry is both conspicuous and telling.
>
> But it is not simply the term's unexplained absence that undermines petitioners' theory. More fundamentally, the theory is simply too restrictive, failing to accommodate either the language or the intent of the 1972 Amendments."

Had Congress intended that, of the employees injured on navigable waters, only those workers whose duties bore a "significant relationship to maritime activities" should be covered, it would

have clearly expressed such intention. Instead, the only limitations on coverage in the Congressional Committee reports, are those addressed to newly-covered land based employees added by the Shorewood Extension of the 1972 Amendments: (Caputo/Blundo, p. 266 (supra)

> "Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. ********* Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters. S. Rep. 13; H.R. Rep. 10-11."

With regard to employees who would have been covered prior to the 1972 Amendments as defined by the Court in Caputo/Blundo, p. 273 (supra), the

intention of Congress was to expand rather than limit coverage, viz:

> "Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity."

The Court below in its initial decision in the case at bar construed the spirit and intent of the 1972 Amendments as follows:

> "Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility. What concerned Congress was injuries on land." Fusco v. Perini North River Assoc., 601 F.2d 659, 666 (A-22).

In Brown & Root Inc. v. Joyner, 607 F.2d 1087, 1090 (1979), the Fourth Circuit in applying coverage to construction workers engaged in building a dry dock viewed

the effect of the amendments upon formerly covered employees as follows:

> "We are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments."

Close scrutiny of this court's subsequent opinion in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 reveals a judicial view of the 1972 amendments as extending coverage to additional land based employees. However, there is no indication therein, either on the part of Congress or this Court, of an expressed or implied intent to withdraw coverage from water based employees, who would have been covered under pre-amendment law, viz:

> "The issue in this case thus becomes whether Ford and Bryant are the kind of land-based employees that Congress intended to encompass the term 'maritime employment.'" Ford (supra), p. 81.

Further examination of the language in Ford reveals that this court perceived Congressional intent, in enacting the 1972 amendments, as not only preserving coverage previously applicable to pre-amendment water based employees, but as extending benefits to such water based employees who sustained injury while working in an adjoining shoreward area, viz:

> "Congress wanted to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act." p. 75.

The Court below, apparently misconstrued this court's rejection of its "geographical" definition of the term "person engaged in maritime employment" as a direction to apply the amended act in a restrictive rather than expansive manner. In so doing it reversed its

original decision and denied coverage to a maritime construction worker like Fusco, who would have been covered under pre-amendment law.

When this Court in Ford said: "The term 'maritime employment' refers to the nature of a worker's activities.", (p. 78), it imposed no requirement that such activities "bear a significant relationship to navigation or to commerce on navigable waters" (Fusco v. Perini, A-4) so as to withdraw benefits under the Act from a class of water based workers who would have been covered under the pre-1972 law. The clear purpose of the "occupational" requirement imposed by this court in Ford was to preclude the application of the Act from those land based employees, clearly not engaged in maritime work,

who might incidentally sustain injury in the newly added adjoining shoreward areas, viz:

> "Our decision serves the intent of Congress in creating the status requirement. First, it focuses upon the nature, not the location, of employment. Second, it does not extend coverage to all workers in the situs area. There is no doubt for example, that neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the marine situs. Such a person's 'responsibility is only to pick up stored cargo for further trans-shipment.' S. Rep. No. 92-1125, p. 13 (1972); H. R. Rep. No. 92-1441, p. 11 (1972); see Northeast Marine Terminal Co. v. Caputo, 432 U.S. at 267, 275, n.37."

In imposing its own restrictive definition of the term "maritime employment" to deny coverage to a construction worker whose principal duties are performed on navigable waters and who would

have been covered under pre-amendment law, the Court below ignored the spirit and intent of this court's decision in Ford, viz:

> "Our decision today also serves the broader congressional purpose of expanding coverage." (p. 83)

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT.

Respectfully submitted,

EPSTEIN & EPSTEIN
Attorneys for Petitioner
Ronald Fusco

BERNARD S. EPSTEIN,
Of Counsel

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1377-9—September Term, 1979.

(On remand from the Supreme Court of the United States Decided June 4, 1980)

Docket Nos. 79-4006, -4015, -4016

RONALD FUSCO,

Petitioner,

and

BERNARD SULLIVAN,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

—v.—

PERINI NORTH RIVER ASSOCIATES,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

Appendix A

Before:

MESKILL, *Circuit Judge** and
WYZANSKI, *Senior District Judge.***

WYZANSKI, *Senior District Judge*:

This case is before us on a remand from the Supreme Court of the United States.

Perini No. River v. Fusco, Sup. Ct. of U.S. Oct. Term 1979 No. 79-759, January 14, 1979, 48 L.W. 3451, ____ U.S. ____, vacated our judgment in *Fusco, et al. v. Perini North River Associates, et al.,* 601 F.2d 659 (2nd Cir. 1979) and remanded the case to us "for further consideration in light of *P.C. Pfeiffer Co. v. Ford,* 444 U.S. ____ . . . ," 48 L.W. 4018 (Nov. 27, 1979), Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun dissenting.

As shown in our original opinion in *Fusco v. Perini North River Associates, supra,* p. 661, this case involves two separate claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act [LHWCA], as amended in 1972, 86 Stat. 1251, 33 U.S.C. §901 (1970 ed., Supp. V), *et seq.* Each claimant was injured over navigable waters while engaged in constructing a sewage disposal project extending over the water.

The claimants contended that when injured they were "employees" within § 2(3) of LHWCA on the broad ground that each was "engaged in maritime employ-

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* Circuit Judge Gurfein, who presided over the panel when the appeal was first argued and decided, died on December 16, 1979 before this case had been remanded by the Supreme Court of the United States.

** Of the District of Massachusetts, sitting by designation.

ment" and on the narrow ground that each was a "harborworker."[1]

In Fusco's case Administrative Law Judge Lesser, without expressly ruling on the narrow ground that Fusco was a "harborworker," concluded that "at the time of his injury the Claimant was employed as a construction laborer engaged in the construction of a substructure for a sewage disposal plant over navigable waters, which employment was within the coverage of the Act." (p. 661) Accordingly, the ALJ allowed Fusco compensation.

In Sullivan's case Administrative Law Judge Feldman concluded that "Claimant is not a longshoreman, ship repairman, shipbuilder, or shipbreaker, nor could he be classified as a harbor worker," (p. 662), and, therefore, denied, him compensation under the LHWCA.

The Benefits Review Board [BRB] reversed the ALJ in *Fusco* and affirmed the ALJ in *Sullivan* on the ground that "the claimants herein were engaged in the construction of a sewage disposal plant, their employment did not have a realistically significant relationship to maritime activities involving nagivation and commerce over navigable waters. It follows that claimants were not engaged in maritime employment pursuant to Section 2(3) and thus are not covered under the Act." (p. 662). Thus the BRB explicitly rejected the broad ground and implicitly rejected the narrow ground of the claims of both Fusco and Sullivan.

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1 We decline to consider Sullivan's claim in his May 19, 1980 Supplemental Brief that he comes within §2(3) because he occasionally performed longshoring operations. Sullivan did not make this claim in his petition for review to this court. Moreover, the evidence does not show that at the time he was injured Sullivan was performing longshoring operations.

Appendix A

In our original opinion, without considering whether either claimant was a harborworker, we concluded that each claimant was a "person engaged in maritime employment" because the term "maritime employment" was to be interpreted geographically as including anyone whose principal duties are performed on navigable waters." We, therefore, held that each claimant was entitled to compensation. (p. 669).

The conclusion upon which our earlier opinion rested has been rendered untenable by the holdings in *P.C. Pfeiffer v. Ford, supra,* (hereinafter called the Ford case) that, as used in §2(3) of the LHWCA, "the term 'maritime employment' refers to the nature of a worker's activities," 48 L.W. 4020, and that it is "an occupational rather than a geographic concept." *Ibid.*

While the Ford case does not deal with construction workers and the opinion does not address itself to the question whether the 1972 amendments had the effect of depriving any class of workers of benefits which it would have enjoyed under the pre-1972 law, we read the opinion as precluding any application of the LHWCA, as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

That reading is consistent with the construction of §2(3) of the LHWCA given in this case by the BRB, and given earlier by *Weyerhaeuser Co. V. Gilmore,* 528 F.2d 957 (9th Cir. 1975), cert. denied 429 U.S. 868 (1976). It is also consistent with the specific instances of "maritime employment" set forth in the §2(3) definition of employee—where the reference is to "any longshoreman or other person engaged in longshoring operations, any harborworker including a ship repairman, shipbuilder, and shipbreaker."

In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant. It is not significant that the plant was being constructed so that sewage would not cause pollution of navigable waters; nor that the claimants performed part or all of their work while upon floating stages or upon barges. The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept—a foundation precluded by the reasoning in the Ford case.

Parallel reasoning leads us to hold that the claimants were not within the meaning of §2(3) "harborworkers." As there used, the term "harborworker" does not refer to the place where the employee works but to the activity he performs. To come within §2(3) a harborworker's activity must relate to ships, as is shown by the test of §2(3) which refers to a "harborworker including a ship repairman, shipbuilder, and shipbreaker."

In summary, on the basis of the reasoning in *P.C. Pfeiffer Co. v. Ford,* we deny the petitions of Fusco and Sullivan and affirm the BRB's November 30, 1978 order.

We adhere to our earlier opinion's conclusion that the Director's petition should be dismissed for lack of statutory standing.

Petitions of Fusco and Sullivan denied.

Petition of the Director dismissed for lack of statutory standing.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1377-9—September Term, 1979

(On remand from the Supreme Court of the United States Decided June 4, 1980)

(Petition for Rehearing filed June 18, 1980 Decided August 19, 1980)

Docket Nos. 79-4006, -4015, -4016

RONALD FUSCO,

Petitioner,

and

BERNARD SULLIVAN,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent.

Appendix B

Before:

MESKILL, *Circuit Judge** and
WYZANSKI, *Senior District Judge***

WYZANSKI, *Senior District Judge:*

This case is before us on a petition for re-hearing filed by Sullivan.

Our Footnote 1 on page 3277 of our opinion dated June 4, 1980 erroneously stated that Sullivan had not claimed that he occasionally performed longshoring operations.

Nonetheless, our conclusion that Sullivan was not engaged in longshoring operations was correct. The evidence shows that his duties were exclusively in connection with the construction of a sewage disposal plant. When Sullivan unloaded a barge used in carrying construction materials from the shore to the point of construction, he was not performing operations which longshoremen perform. Longshoremen do not unload barges used in connection with construction of a structure which reaches from a point on shore to a point in the river.

Petition denied.

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* Circuit Judge Gurfein, who presided over the panel when the appeal was first argued and decided, died on December 16, 1979 before this case had been remanded by the Supreme Court of the United States.

** Of the District of Massachusetts, sitting by designation.

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OUTPUT SYSTEMS, INC., 157 Chambers St., N.Y. 10007, (212) 374-1234

APPENDIX C

PERINI NORTH RIVER ASSOCIATES et al., petitioners, v. Ronald FUSCO and Bernard Sullivan. No. 79-759.

Facts and opinion, 601 F.2d 659.

Jan. 14, 1980. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of P.C. Pfeiffer Co. v. Ford, 444 U.S. ___, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979).

Mr. Justice BRENNAN, Mr. Justice MARSHALL and Mr. Justice BLACKMUN dissent.

APPENDIX D

Opinion of the United States Court fo Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 869, 870, 871—August Term, 1978.

(Argued April 30, 1979 Decided June 29, 1979.)

Docket Nos. 79-4006, -4015, -4016

RONALD FUSCO,

Petitioner,

—and—

BERNARD SULLIVAN,

Petitioner,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

—v.—

PERINI NORTH RIVER ASSOCIATES,

—and—

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

Before:

GURFEIN and MESKILL, *Circuit Judges*, and WYZANSKI, *Senior District Judge.**

* Of the District of Massachusetts, sitting by designation.

Appendix D

Petitions for review of an order of the Benefits Review Board, United States Department of Labor, denying compensation to petitioners Fusco and Sullivan. Set aside on the ground that a construction worker whose principal duties are performed on navigable waters as that term was defined in §3(a) of the original 1927 Longshoremen and Harbor Workers' Act, 44 Stat. 1426, 33 U.S.C. §903(a) and who sustains on such waters a work-related injury is, within the meaning of §2(3) of the Longshoremen and Harbor Workers' Compensation Act, as amended in 1972, 86 Stat. 1251, 33 U.S.C. §902(3) (1970 ed., Supp. V), "a person engaged in maritime employment."

BERNARD S. EPSTEIN, Epstein & Epstein, New York, NY, *for petitioner Ronald Fusco.*

JOSEPH KLOTZ, New York, NY, *for petitioner Bernard Sullivan.*

CARIN ANN CLAUSS, LAURIE M. STREETER, MARK C. WALTERS, U.S. Dept. of Labor, Washington, D.C., *for petitioner Director, Office of Workers' Compensation Programs.*

WILLIAM F. FISCHER, JR., MARTIN KRUTZEL, Fischer Brothers, New York, NY, *for respondents Perini North River Associates and Hartford Accident and Indemnity Company.*

WYZANSKI, *Senior District Judge:*

The main question presented is whether a construction worker whose principal duties are performed on navigable waters, as that term was defined in §3(a) of the original

Longshoremen and Harbor Workers' Act, [LHWCA] 44 Stat. 1426, 33 U.S.C. §903(a), and who sustains on such waters a work-related injury is, within the meaning of §2(3) of LHWCA, as amended in 1972, 86 Stat. 1251, 33 U.S.C. §902(3) (1970 ed., Supp. V) a "person engaged in maritime employment" so as to be covered by LHWCA.[1]

Fusco and Sullivan, having sustained work-related injuries in separate accidents in the course of their employment by Perini during the construction of a sewage disposal plant, called the North River Pollution Control Project, filed claims for compensation under the Longshoremen's and Harbor Workers Compensation Act [LHWCA], as amended in 1972, 86 Stat. 1251, 33 U.S.C. §901, (1970 ed., Supp. V) *et seq.*

Lesser, A.L.J. heard Fusco's case; Feldman, A.L.J. heard Sullivan's case. Each ALJ made findings as to the Perini project. These findings differ slightly from one another and from parallel findings by Cappo, A.L.J. in a companion case, which the BRB found most accurate. For our purposes the following two paragraphs serve as a fair summary of the findings as to Perini.

Perini is engaged in the business of heavy construction. The City of New York awarded it a contract to construct a substructure for a sewage disposal plant called the North River Pollution Control Project, to be located on the North River between 133rd and 148th Streets and to extend from

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1 The relevant statutory section, defining "employee," with italics indicating the material added to the original statute by 1972 amendments, 86 Stat. 1251, 33 U.S.C. §902(3) (1970 ed., Supp. V) provides:

"The term 'employee' *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

the shoreline out over the water approximately 700 feet to the pierhead.

Perini's contract required it to place 2,300 hollow circular pipes, called caissons, in navigable waters down to imbedded rock, to fill the caissons with concrete, to connect them together at proper elevations above the water with concrete beams, and to place precast concrete slabs on top of the beams.

Lesser, A.L.J. found that Fusco "worked on floating stages assisting the so-called 'dock building' in the construction of the substructure, performing such tasks as fetching materials from barges or from the shore, assisting in the driving of caissons into the riverbed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct platforms across those beams," and that "he fell while descending a ladder" and "in falling struck his head against a concrete form." The ALJ added that "one witness [whom the ALJ seems to have credited] did observe the Claimant climbing down a ladder from one of the concrete forms down to a raft below; the witness saw the ladder twist and the Claimant suddenly disappear from sight." The ALJ stated as a conclusion of law that "at the time of his injury the Claimant was employed as a construction laborer engaged in the construction of a substructure for a sewage disposal plant over navigable waters, which employment was within the coverage of the Act." The ALJ entered an order directing respondents to compensate Fusco. Respondents appealed to the Benefits Review Board [BRB].

Feldman, A.L.J. found that Sullivan "was directly involved" in "the building and filling of caissons (large cylinders sunk upright into the water) into which steel reenforcing rods were inserted . . . and re-enforcing horizontal beams hanging over the water from caisson to caisson. . . .

Appendix D

While working on beams at high tide, Claimant . . . would frequently be standing in water. . . . Two or three times a week Claimant . . . went aboard barges to unload steel rods or to prepare such rods to be moved by cranes that were aboard some of the barges. . . . At the time of the accident, Claimant was standing about 12 inches above the water." The ALJ's conclusions of law were "that the situs requirements for coverage under the Act have been met, Claimant having been injured while at work upon navigable waters," and that "the Employer meets the requirements of Section 2(4) of the Act in that at least some of its employees are engaged in maritime employment," but that "Claimant is not a longshoreman, ship repairman, shipbuilder, or shipbreaker. Nor could he be classified as a harbor worker," and that "nothing in Claimant's occupation . . . entails maritime employment." The ALJ entered an order rejecting the claim. Sullivan appealed to the BRB.

The BRB heard in one proceeding *Fusco, Sullivan,* and two other cases, and permitted the Director, Office of Workers' Compensation Programs, United States Department of Labor, to become a party in interest. By its November 30, 1978 order, the BRB reversed Lesser, A.L.J. in *Fusco* and affirmed Feldman, A.L.J. in *Sullivan.* Writing for himself and Member Kalaris, over the dissent of Member Miller, Chairman Smith of the BRB,[2] after noting that "Claimants were found in each case to have satisfied the Section 3(a) situs test . . . [and that] [t]he findings of situs are not on appeal," held that "Since the claimants herein were engaged in the construction of a sewage disposal plant, their employment did not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. It follows

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2 The BRB opinions are reported at 9 BRBS 378.

that the claimants were not engaged in maritime employment pursuant to Section 2(3) and thus are not covered under the act."

Fusco, Sullivan, and the Director, relying upon 33 U.S.C. §921(c), petitioned this Court to set aside the BRB November 30, 1978 order.

The petitions before us raise only one question, the so-called status issue—whether the claimant at the time of his injury was a "person engaged in maritime employment," as that phrase is used in §2(3) of the LHWCA, 86 Stat. 1251, 33 U.S.C. §902(3) (1970 ed., Supp. V). Respondents contend that we must also consider the so-called situs issue—whether the injuries occurred on navigable waters.

In *Sullivan,* where respondents succeeded before both the ALJ and the BRB, the respondents are entitled to contend that if they do not prevail before us on the status issue they are entitled to prevail on the situs issue. But in *Fusco* we need not consider respondents' contention because when respondents appealed from the ALJ to the BRB they abandoned the situs issue by their failure to assign it as error. (App. 31, note 2). Yet one of the arguments addressed to us by petitioners with respect to the status issue—to wit, that under the 1927 Act before it was amended in 1972 petitioners would have been entitled to compensation for the injuries of which they complain—makes it appropriate for us, before we tackle the status issue, to scrutinize the administrative findings not merely in *Sullivan* but also in *Fusco* in order to determine whether the injuries occurred upon navigable waters as that term was used in the original 1927 LHWCA and as it is now used under the 1972 amendments.

In our scrutiny we need to bear in mind that under the 1927 LHWCA, before its amendment, there was coverage only for "an injury occurring upon the navigable waters of

the United States." 44 Stat. 1426, 33 U.S.C. §903(a). Since the term "navigable waters" was then read literally and did not include extensions of land, there was no coverage of an injury occurring on a structure permanently affixed to land. *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 214-215 (1969). It was only after the 1972 amendments that the term navigable waters of the United States was defined to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 86 Stat. 1251, 33 U.S.C. §903(a) (1970 ed., Supp. V).

In *Fusco* the injury occurred as the claimant descended a swinging ladder from a concrete form to a raft, and the ladder twisted and threw him against the form, causing him to fall, perhaps but not certainly, into the water. Respondents contend that this was an injury occurring *on* a structure permanently affixed to land, and so was not within the coverage of the original 1927 Act. We conclude that respondents are mistaken. Fusco was injured over navigable waters while on a rope ladder temporarily affixed to a structure which may or may not have been permanently affixed to land. He was hit by the structure not while on it, but while on the ladder. Under both the 1927 LHWCA and the 1972 amendments Fusco's injury occurred "upon navigable waters."

In *Sullivan* the injury occurred while the claimant "was installing beams about 150 feet from the shore and was standing about 12 inches above the water." The ALJ does not tell us upon what he was standing. But from the ALJ's findings and the BRB's opinion we know that the part of Perini's construction work in which Sullivan was involved called for connecting embedded or sunken caissons at proper elevations above the water with concrete beams.

We therefore cannot suppose that at the time of the accident, while installing beams hanging over water, Sullivan was standing on a structure permanently affixed to land. We conclude that Sullivan's injury occurred "upon navigable waters" as that term was used in 1927 as well as in 1972.

The foregoing analysis disposes of respondents' contention that, regardless of how we decide the status issue, they are entitled on the basis of the situs issue to have the November 30, 1978 BRB order affirmed.

We now turn to the main question presented in each of the two cases before us—whether at the time of his injury the claimant was a "person engaged in maritime employment" as that phrase is used in §2(3) of the amended LHWCA 86 Stat. 1251, 33 U.S.C. §902(3) (1970 ed., Supp. V).

The phrase "a person engaged in maritime employment" (hereinafter sometimes called "the critical phrase") is not defined in the 1972 Amendments nor in the 1927 LHWCA which was being amended.

Etymologically, the critical phrase could have an occupational, or a geographical connotation, or both: that is, it could refer to a person engaged in an occupation characteristically associated with the sea or other navigable waters, and/or to a person engaged in work upon the sea or other navigable waters.[3]

The BRB in the instant case gave to the critical phrase an occupational interpretation,[4] modeled on, but somewhat

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3 See 1A Benedict on Admiralty, (7th ed. 1973) §17: "On the basis that there can be nothing more maritime than the sea, every employment on the sea or other navigable waters should be considered as maritime employment."

4 The BRB concluded "that a claimant's employment must have a realistically significant relationship to maritime activities involving

different from, the interpretation given by the Ninth Circuit[5] in *Weyerhauser Company v. Gilmore*, 528 F.2d 957, 961 (9th Cir.), *cert. denied*, 429 U.S. 868 (1976). Petitioners contend that the appropriate interpretation is geographical. Respondents support an occupational interpretation.

The strongest argument for an occupational interpretation rests on a portion of the bare text of the statute. The critical phrase is immediately followed by the words "including any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker." The word "including" does not necessarily determine that the critical phrase refers to a class of which the following specifically described persons are members.[6] But it is noteworthy that, with the possible exception of harborworkers, each of the persons specifically described is described occupationally not geographically. The *noscitur a sociis* and *ejusdem generis* canons of construction suggest that the critical phrase is used occupationally and as a description of a class of persons in terms of their occupation.

Yet that argument fails to give any weight to another argument also based on the bare text of the statute. The

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navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)."

5 *Weyerhauser Company v. Gilmore*, *supra*, held:

[T]hat for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903.

6 Thus, for example, the words "human beings" are descriptive of a class when used in the phrase "human beings, including men and women," but are not descriptive of a class when used in the phrase "human beings, including cats and dogs."

critical phrase is so nearly identical with the phrase "employees . . . employed in maritime employment" which appears in §2(4) (quoted in footnote 7) of the very statute which was being amended that it seems to have been adapted, if not adopted, from §2(4). This invokes a different rule of statutory construction: when a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase. *Barnet v. Harmel,* 287 U.S. 103, 108 (1932).

In view of the ambiguity of the text of the 1972 Amendments, we find it necessary for an understanding of the critical phrase to turn to the legislative and judicial history of the original 1927 LHWCA as well as the legislative history of the 1972 amendments, especially since, as we have recently been reminded, the LHWCA "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel,* 346 U.S. 328, 333 (1953) quoted in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 268 (1977).

Congress enacted the original 1927 LHWCA in response to *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), and *Washington v. W. C. Dawson & Co.,* 264 U.S. 219 (1924), which held that the States were without power, and Congress could not delegate to them power, to provide compensation for longshoremen injured on navigable waters. Mr. Justice Brennan, writing for the majority of the Supreme Court, in *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114 (1962) read the legislative history as showing that it was the Congressional purpose to enact "a statute which would provide federal compensation for all injuries

to employees on navigable waters; in every case, that is, where *Jensen* might have seemed to preclude state compensation." (*Ibid.*, pp. 120-121). He rejected the narrower reading by Mr. Justice Stewart, who regarded the Congressional purpose as merely "to provide a compensation remedy for those who could not obtain such relief under state law." *Ibid.*, p. 134.

In carrying out its purpose, Congress proceeded by adopting special definitions of injury, employee, and employer[7] and defining coverage.[8] The consequence of those definitions was that so long as a work-related injury occurred on navigable waters and the injured worker was not a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net, the worker would be eligible for federal compensation provided that his employer had at least one employee (who might be the claimant himself) "employed in maritime employment in whole

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7 "'Injury, 'employee,' and 'employer' were defined in 33 U.S.C. §§902(2), (3), (4):

"(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. . . .

(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

8 "Title 33 U.S.C. §903 defined the coverage provided by the Act:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ."

or in part."[9] The 1927 statute gave no guidance as to the meaning of the phrase just quoted, which appeared in the definition of "employer."

For decades the Supreme Court and inferior federal courts struggled to interpret the eligibility provisions of the 1927 LHWCA. In *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 247 (1941) the Supreme Court upheld a finding of a Deputy Commissioner that a janitor whose only maritime activity was one trip as a lookout on a boat was "engaged in maritime employment" so as to make his employer subject to the LHWCA. In *Davis v. Department of Labor and Industries*, 317 U.S. 249 (1942) all of the members of the Supreme Court agreed that federal coverage under LHWCA would have been available for a structural steel construction worker who worked over navigable waters, but whose duties were exclusively related to construction of a bridge. In *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953) it was held that a railroad worker injured on navigable waters was covered by the LHWCA. Finally, *Calbeck v. Travelers Insurance Company, supra*, in 1962 conclusively settled that any employee, no matter what his calling, who was injured while at work on navigable waters was [in maritime employment] covered by the LHWCA.

We doubt that Supreme Court ever said *in haec verba* that any person employed upon navigable waters is, for purposes of §2(4) of LHWCA, 33 U.S.C. §902(4), "employed in maritime employment;" but that is the only principled explanation of many of the cited Supreme Court cases, especially *Davis v. Department of Labor and Indus-*

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9 See Marshall, J. in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264 (1977).

tries, and of many lower federal court cases, including cases involving construction workers.[10]

We now come to the legislative history of the 1972 Amendments.

As is shown by the complete text of the 1972 Amendments, 86 Stat. 1251-1265, and by the virtually identical Senate and House reports—S.Rep.No. 92-1125, 92 Cong. 2 Sess. (1972) and H.R.Rep.No. 92-1441 (of which relevant portions are printed in the margin),[11] the main concerns

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10 *Peter v. Arrien*, 325 F.Supp. 1361, 1365 (E.D. Pa. 1971) aff'd, 463 F.2d 252 (3rd Cir. 1972); *Hardaway Contracting Co. v. O'Keeffe*, 414 F.2d 657 (5th Cir. 1968); *DeBardeleben Coal Corp. v. Henderson*, 142 F.2d 481, 482, note 3 (5th Cir. 1944); *Travelers Ins. Co. v. Branham*, 136 F.2d 873, 875 (4th Cir. 1943).

11 [I]n the section describing the shoreward extension, the Committee Reports state:

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of *longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment* (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel." S.Rep.13; H.R.Rep.10. [Emphasis added].

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, *just because they are injured in an area* adjoining navigable waters used for such activity. Thus employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, *nor would purely clerical employees whose jobs*

of Congress were unrelated to "coverage." See *Northeast Marine Terminal Co. v. Caputo, supra,* pp. 261-262. Indeed, that topic occupied only half a page of a 15-page set of amendments.

When Congress did deal with coverage, it did not undertake a general study of the subject. Congress did not address itself to the problems raised in *Parker, Davis, Pennsylvania Railroad, Calbeck,* or cognate lower federal court cases, nor did Congress comment upon the *Calbeck* doctrine that it was the Congressional purpose to give a federal compensation remedy to all workers, except crew members, injured seaward of the *Jensen* line. *Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility.* What concerned Congress was injuries on land.

The original Act had not provided compensation to anyone on land. *Nacirema Operating Co. v. Johnson, supra.*

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do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. *Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment.* Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S. Rep.13; H.R.Rep.10-11. [Emphasis added].

"Section 2(a) amends section 2(3) of the Act to define an 'employee' as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoreing [*sic*] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude *other employees traditionally covered* but retains that part of 2(3) which excludes from the definition of 'employee' masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net." S.Rep.16. See also, H.R. Rep.14. [Emphasis added].

This often seemed inequitable, especially in the case of longshoremen who moved back and forth from vessel to dock[12] or who worked stripping and stuffing containers at terminals, as has become common as a result of modern technology.[13] So Congress decided to extend the coverage shoreward for the benefit of "longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment," but Congress did not want to include persons "just because they are injured in an area adjoining navigable waters."[14]

To give longshoremen, harborworkers, and any person engaged in maritime employment the benefit of coverage while they were on areas adjoining navigable waters, Congress broadened the definition of "navigable waters" of the United States to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[15]

To make sure that on that new situs eligibility would not extend to a person who had no relation to maritime employment except that his employer had at least one employee employed in maritime employment, Congress amended the definition of "employee."

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12 See *Northeast Marine Terminal Co. v. Caputo*, *Ibid.*, pp. 259-260, 269.

13 *Ibid.*, p. 269.

14 See footnote 11.

15 33 U.S.C. §903(a) (1970 ed., Supp. V) provides:

"Compensation shall be payable . . . in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*) . . . ." [The italicized parts indicate material added in 1972].

Appendix D

Explaining the amendment to the definition of "employee" in §2(3), the Congressional Committees stated:

> The definition specifically includes any longshoreman or other person engaged in longshoreing [sic] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered. . . .

In the phrase "other employees traditionally covered" the word "covered" deserves emphasis. Of course it is only the LHWCA's coverage which would be relevant. "Traditionally covered," therefore, means employees previously covered by the LHWCA. The phrase does not mean traditionally employed in navigation or maritime commerce. In fact, most employees engaged in navigation or maritime commerce are crew members who are excluded by §2(3) of the LHWCA and are traditionally covered by the Jones Act, 46 U.S.C. §688, *et seq.*

There is another significant indication that Congress intended that a person who, before 1972, had eligibility because his principal duties were on navigable waters as then defined should retain his eligibility. In the Committee Reports there is a discussion of the effect of the 1927 definition of an "employer," which appears in §2(4) of the 1927 Act, 49 Stat. 1426. Interestingly, the Committee misquotes §2(4) both by changing "employed" to "engaged," and by mislocating the phrase "in whole or in part." The correct text of the 1927 version of §2(4) reads:

> The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

Appendix D

The 1972 Congressional Committee's description of the term "employer" reads:

> A person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment.

If we reflect on this misquotation and then look at the introductory phrase in the 1972 definition of employee, "any person engaged in maritime employment," it does not take a Sherlock Holmes to infer that whoever drafted the 1972 definition of "employee" borrowed the just-quoted part of it from his reading of the 1927 definition of "employer." In the light of the judicial gloss on the 1927 definition of "employer" there is a presumption that the draftsman intended that the 1972 definition of employee should cover at least any person whose principal employment was upon water.

We now turn from the legislative history to a review of factors not emphasized by Congress but in our view relevant to the question presented to us.

1. The Supreme Court has given far more than lip service to its oft-repeated statement that LHWCA and the amendments thereto are remedial acts which are to be liberally interpreted to benefit employees and avoid harsh results. The Court has not hesitated even to read out of the LHWCA an explicit statutory provision (to wit, that part of §3(a) of the 1927 LHWCA, former 33 U.S.C. §903 (a) which provided that compensation shall be paid for injuries occurring on navigable waters only "if recovery . . . through workmen's compensation proceedings may not validly be provided by state law"), where the Court found it repugnant to the general purpose of Congress to protect

persons injured seaward of the *Jensen* line. *Calbeck v. Travelers Ins. Co., supra.*

2. *A petitio principii* is built into the frequently-repeated statement that before 1972 the right to recover under the LHWCA was based primarily on the situs of the injury and that the 1972 amendments changed the basis of recovery to make it dependent both on a status test and a situs test. The Congressional Committees never used the words "situs" and "status" although those words must have been known to Congress since they were used in *Nacirema Operating Co. v. Johnson, supra,* 396 U.S. at 215, which was one of the cases which triggered the 1972 Amendments. We ought not to assume that just because Congress moved into a two-pronged situation with respect to injuries over land, it also moved into a two-pronged situation with respect to injuries over water, especially when there is no evidence of such an intention except possibly in one tangential situation. The possible exception relates to a person whose principal duties are on land and who sustains a work-related injury on navigable waters. Under the pre-1972 LHWCA a land-based worker injured on a single trip over water could recover. *Parker v. Motor Boat Sales, Inc., supra.* When Congress amended §2(3) it borrowed from the §2(4) text but omitted the words "in whole or in part," and thus Congress may have established as a test of status the question whether the injured person had his major activities upon navigable waters. Cf. *Thibodaux v. Atlantic Richfield Co.,* 580 F.2d 841 (5th Cir. 1978), cert. denied, 47 U.S.L.W. 3771 (U.S. May 29, 1979).

3. Unless the term a "person engaged in maritime employment" be read geographically to include a person who while at work on navigable waters suffers a work-related

injury, some persons employed on navigable waters will be left without any compensation remedy, state or federal. We have no data showing how large this group is in a period of increased exploration, excavation, drilling, and other enterprise on navigable waters. Moreover, even if there is protection under state law, Congress might regard it as inadequate. In 1972 Congress demonstrated that it did not want to leave persons injured on navigable waters to the often low scale of state benefits: it removed the restriction which, in the 1927 Act, had made federal compensation payable "only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."[16]

4. Any occupational interpretation such as that proposed by the BRB—"a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order to be deemed maritime employment under Section 2(3)"—runs into great difficulty. Obviously it does not apply to a member of a crew, because §2(3) itself excludes him. If it were to be applied to all other significant relationships to navigation and commerce this would do violence to the statement in the Congressional Reports that there would not be LHWCA coverage as a result of the amendments for "purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." In short, it seems as though an occupational definition of the critical phrase would be a perversion of Congressional purpose unless it is limited to the specific categories of longshoremen, harborworkers and so forth. And if so limited it is duplicitous and superfluous.

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16 See *Northeast Marine Terminal Co. v. Caputo*, *supra*, page 263, n. 21; see historical note to 33 USCA §903.

5. The geographical interpretation avoids the anomaly of different readings of substantially the same phrase in two adjacent sub-sections, §2(3) and §2(4) of the same Act. Were different interpretations to be prescribed, there would be sure to follow considerable confusion of claimants, their counsel, administrators, and judges. The importance of identical interpretations is illustrated by a case we are deciding today. See *Tantzen, et al. v. Shaughnessy,* 2nd Cir., No. 79-4034, ——, 1979.

6. The geographical interpretation gives administrative agencies and courts the benefit of a vast body of previous judicial interpretations of the phrase "employed in maritime employment."

7. A geographical test, as experience shows, rests upon a simple standard which will minimize litigation and increase efficiency without any apparent social disadvantage. See 4 Larson, Workmen's Compensation Law (1979), §89.27, at pp. 16-178; Gilmore & Black, The Law of Admiralty (2nd ed. 1975) pp. 428-430.

8. Despite what is said in *Weyerhauser Company v. Gilmore,* at p. 961, col. 1, the geographical interpretation of "maritime employment" will not make superfluous the critical phrase in §2(3), 33 U.S.C. §902(3) and will not leave the Act with no status test whatsoever. Under such an interpretation, the 1972 Amendment will still operate, as Congress intended, to preclude compensation being paid to a land-based employee whose only claim to coverage is that he, while working for an employer who had an employee engaged in maritime employment, was injured on land in an area adjoining navigable waters. See Larson, *supra,* §89.27, p. 16-182.

9. Even if under a geographical interpretation of the 1972 Amendment an employer like Perini finds that on the same construction project some of its construction employees are under federal compensation law, some are under state compensation law, and some alternating according to their work assignments, this lack of uniformity may be justified by genuine differences (not experienced, for example, by longshoremen) between the risk of maritime employment and the risk of land-based employment. Moreover, if uniformity is desirable that is a question for Congress, not for us. So far, Congress has sought uniformity only by assuring longshoremen and harborworkers that they will be as highly compensated for injuries sustained ashore as on navigable waters. It would be another story for us, undirected by Congress, to hold that construction workers injured on navigable waters are, for the sake of uniformity, to be limited to the compensation that they or other construction workers would receive for injuries on land-based jobs.

Weighing all relevant factors, we interpret the critical phrase "person engaged in maritime employment" geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972. In this case we have no occasion to decide whether the critical phrase also includes a person whose principal duties are on land but who suffers work-related injuries while performing duties upon navigable waters.[17]

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17 In this case it is unnecessary for us to decide the eligibility of a person who performed merely incidental duties on navigable waters. Cf. *Thibodaux v. Atlantic Richfield Co.*, *supra*, holding that the amended LHWCA does not apply to an employee who performs his duties on land but is injured during his transportation over navigable waters while journeying from one land duty to another land duty.

Our conclusion is consistent with the purposes of the Congress—to extend and not to withdraw eligibility—and avoids the harsh results which would flow from a strictly occupational interpretation.

Since each claimant—that is, Fusco and Sullivan—performed his principal duties upon navigable waters as that term was defined in §3(a) of the original 1927 LHWCA, 44 Stat. 1426, 33 U.S.C. §903(a), and sustained on such waters a work-related injury, we hold that each was eligible for compensation as "a person engaged in maritime employment" within the meaning of §2(3) of the LHWCA as amended in 1972, 86 Stat. 1251, 33 U.S.C. §902(3) (1970 ed., Supp. V).

There remains for us to consider the respondents' motion to dismiss the Director's petition on the ground that he lacks standing to petition for review of the BRB's November 30, 1978 order.

We hold that the Director was not "adversely affected or aggrieved" by the Board's November 30, 1978 order denying Fusco's and Sullivan's claims to compensation. Therefore, he lacks statutory standing to petition for review pursuant to 33 U.S.C. §921(c). *Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978). *I.T.O. Corporation of Baltimore v. Benefits R. Bd.*, 542 F.2d 903 (4th Cir. 1976), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, *rev'd on remand on other grounds*, 563 F.2d 646 (1977). We cannot improve upon what seem to us the irrefutable analyses of Judges Ainsworth and Winter, for the Fifth and Fourth Circuits, respectively. If our earlier opinion in *Pittston etc.* looks the other way, it is not controlling because we simply found it unnecessary there to decide the standing of the Solicitor of Labor to move to dismiss an

appeal by an employer as untimely, 544 F.2d at 42. In any event we do not suggest in *Pittston* that the Solicitor or the Director could seek independent review to attempt to *reverse* the BRB.

We need not decide whether the Director lacks constitutional standing under U.S. Constitution Article III on the ground that he does not present what is in his situation a "case or controversy."

Petitions of Fusco and Sullivan granted. The BRB's November 30, 1978 order is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

Petition of the Director dismissed for lack of statutory standing.

APPENDIX E

Decision and Order of the United States Court of Appeals for the Second Circuit Denying Rehearing and Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of August, one thousand nine hundred and seventy-nine.

Present:

HON. MURRAY I. GURFEIN,
HON. THOMAS J. MESKILL,
Circuit Judges,

HON. CHAS. E. WYZANSKI,
District Judge.

Docket No. 79-4006

RONALD FUSCO, *et al.*,
Petitioners,

v.

PERINI NORTH RIVER ASSOCIATES and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

A petition for a rehearing having been filed herein by counsel for the respondents,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

Appendix E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of August one thousand nine hundred and seventy-nine.

Docket No. 79-4006

RONALD FUSCO, *et al.*,

Petitioners,

v.

PERINI NORTH RIVER ASSOCIATES and
HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondents, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

Appendix E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 869, 870, 871—August Term, 1978.

Decided August 21, 1979

Docket Nos. 79-4006, -4015, -4016

RONALD FUSCO,

Petitioner,

and

BERNARD SULLIVAN,

Petitioner,

and

DIRECTOR, Office of Workers' Compensation Programs,
United States Department of Labor,

Petitioner,

—v.—

PERINI NORTH RIVER ASSOCIATES,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

Before:

GURFEIN, and MESKILL, *Circuit Judges,* and
WYZANSKI, *Senior District* Judge.*

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* Of the District of Massachusetts, sitting by designation.

Appendix E

Opinion on Respondents' Petition for Rehearing.

Wyzanski, *Senior District Judge:*

Contrary to what is alleged at page 10 of respondents' petition for rehearing, the record does not show that Sullivan when injured was standing upon a substructure extending from the shoreline. It is true that one of the examining counsel's questions assumed that Sullivan was "on this substructure." But Sullivan never said or implied that he was standing on that substructure. He testified that he was "located right above the water." The fair implication is that he was on a temporary platform above the water and the substructure was under the water. Thus there was substantial evidence for the ALJ to conclude that Sullivan "was standing about 12 inches above the water" and was "injured while at work upon navigable waters."

Petition for rehearing denied.

APPENDIX F

Decision and Order of the Benefits Review Board of the Department of Labor, Together With the Dissenting Opinion of Member Miller

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

FILED AS PART
OF THE RECORD

November 30, 1978
(date)

AGNES KURTZ/WHA
(Clerk)

BENEFITS REVIEW BOARD

BRB No. 77-896

STEPHEN SEDMAK,
Claimant-Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY
Employer/Carrier-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest,

Appendix F

BERNARD SULLIVAN,

Claimant-Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD ACCIDENT & INDEMNITY COMPANY

Employer/Carrier-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Petitioner.

BRB No. 78-129

BRB No. 78-407

RONALD FUSCO,

Claimant-Respondent,

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Employer/Carrier-Petitioners,

Appendix F

EVERETT MCNULTY,

Claimant-Respondent,

v.

PERINI NORTH RIVER ASSOCIATES,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Employer/Carrier-Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

Appeals from the Decisions and Orders of Joyce Capps, Philip J. Lesser, and Robert J. Feldman, Administrative Law Judges, United States Department of Labor.

Joseph F. Klotz, New York, New York, for Claimant Sullivan.

Bernard S. Epstein (Epstein & Epstein), New York, New York, for Claimant Fusco.

Hyman Bass (Roshwald, Bass & Caine), New York, New York, for Claimant Sedmak.

William F. Fischer (Fischer Brothers), New York, New York, for Perini North River Associates.

Marc C. Walters, Gilbert T. Renaut, Linda C. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie N. Streeter, Associate Solicitor), Washington, D.C., for the Di-

rector, Office of Workers' Compensation Programs, United States Department of Labor.

BEFORE:

SMITH, *Chairman*, MILLER and KALARIS, *Members.**

SMITH, *Chairman:*

These are appeals from the Decisions and Orders of Administrative Law Judges Joyce Capps (77-LHCA-877), Philip J. Lesser (76-LHCA-927), and Robert J. Feldman (77-LHCA-65 and 77-LHCA-877), pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, (hereinafter referred to as the Act). In these four cases, each claimant sustained an injury in the course of his employment on the same construction project for Perini North River Associates (hereinafter, Perini). Since each case involves common questions of law and fact, we have consolidated the cases for the purposes of these appeals. 20 C.F.R. § 802.104.

We first turn to a review of the construction project by Perini at which each claimant was injured. Perini's construction project was thoroughly and accurately described by Administrative Law Judge Capps:

> [Perini] is engaged in the business of heavy construction. Approximately five years ago Perini was awarded a low-bidder contract by the City of New York to construct a substructure for the North River Pollution Control Project. The substructure (or foundation) was needed to support the superstructure of a

* Dissent by MILLER, Member, to follow.

sewage disposal plant which would eventually be built by another contractor.

The location of the project is on the North River (which is part of the Hudson River) between 133rd and 148th Streets and extends from the shoreline out over the water approximately 700 feet to the pierhead.

Perini's job began with placing 2,300 caissons[1] down to imbedded rock approximately 25 feet apart. The caissons are then filled with concrete, after which they are connected together at proper elevations above the water with concrete beams 8 by 4 feet in size. Enclosure between the caissons is completed by placing precast slabs of concrete 9 to 12 inches thick on top of the beams, whereupon Perini's job of constructing the substructure is finished.

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[1] Caissons are hollow circular steel pipes about ¾" thick, 42" in diameter, and vary in length from 80' to 250'. [Caissons are also referred to as piles.]

Sedmak v. *Perini North River Associates*, 77-LHCA-877 (slip. op., pages 2-3) (Nov. 9, 1977). With this background in mind, we turn to the individual facts of each case.

SEDMAK

Claimant Sedmak, a dock builder, worked for Perini for four to five months prior to his injury. About 60 percent to 70 percent of his time was spent on a barge setting up the caissons or piles which were an essential part of the substructure or foundation for the sewage disposal plant. He was injured while "working on the job of extending No. 2 ramp east over the North River approximately 225 feet from the shore. . . ."

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Administrative Law Judge Capps concluded that Claimant Sedmak was not engaged in maritime employment within the meaning of Section 2(3), 33 U.S.C. § 902(3), and thus not covered. Given that determination, she found it unnecessary to address the other issues presented in the case. Claimant Sedmak has appealed.

SULLIVAN

Claimant Sullivan, employed as a wire lather, performed a variety of tasks involving the steel reinforcement of the concrete beams and caissons for the substructure. Claimant's duties required him to frequently stand in water while working on the beams and two or three times a week to board barges to hook steel onto a crane and unload the steel. At the time of injury, Claimant Sullivan was installing beams about 150 feet from shore.

Administrative Law Judge Feldman concluded that, although the claimant clearly met the "situs" requirement of Section 3(a), 33 U.S.C. § 903(a), and that Perini met the requirements of Section 2(4), 33 U.S.C. § 902(4), Claimant Sullivan did not satisfy the status test because he was not engaged in maritime employment pursuant to Section 2(3). He also found that the presumption in Section 20(a) of the Act, 33 U.S.C. § 920(a), did not apply to the status issue. Claimant Sullivan and the Director, Office of Workers' Compensation Programs, have appealed.

FUSCO

Claimant Fusco, a construction laborer, worked on floating stages and assisted the dock builders in the construction of the substructure. His duties included:

> . . . fetching materials from barges or from the shore, assisting in the driving of caissons into the river bed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct the platforms across those beams.

Fusco v. *Perini North River Associates*, 76-LHCA-927 (slip op. pg. 2) (Dec. 19, 1978). Claimant Fusco was injured while descending a ladder from one of the concrete forms to a raft.

Administrative Law Judge Lesser concluded that Claimant Fusco was injured over navigable waters according to Section 3(a), and was engaged in maritime employment according to Section 2(3). Perini has appealed.

McNULTY

Claimant McNulty, a dock builder, also worked on the same substructure or foundation as the other claimants. His job duties involved dropping the forms in the river and pulling them up with a crane in order to get them set. At the time of injury, he was working on top of a concrete form about 220 feet from shore.

Administrative Law Judge Feldman concluded that the claimant was injured over a proper situs according to Section 3(a) and was engaged in maritime employment according to Section 2(3). He concluded that Claimant McNulty had established a *prima facie* case for status, although he appears to have deemed the Section 20(a) presumption inapplicable. Perini has appealed.

Appendix F

I.

Although the primary issue in each case is that of maritime employment, we must at the outset deal with the presumption under Section 20(a), 33 U.S.C. §920(a), whose applicability was argued in several of the cases. Section 20(a) provides that:

> Sec. 20. In any proceedings for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this Act.

In *Fusco,* the administrative law judge did not consider the applicability of Section 20(a). In *McNulty,* it appears that the administrative law judge did not use Section 20(a) in determining maritime employment. Rather, he concluded that the claimant had established a *prima facie* case. In *Sullivan* and *Sedmak,* the administrative law judge held that the Section 20(a) presumption did not apply to a determination of status under Section 2(3).

Claimant Sullivan and the Director, Office of Workers' Compensation Programs, have appealed and contend in *Sullivan* and *Sedmak,* the administrative law judges held issues of status. We disagree and conclude that it does not apply in the context of these cases. *See Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom. Northeast Maritime Terminal Co., Inc.* v. *Caputo,* 432 U.S. 249 (1977) (hereinafter, *Caputo/Blundo*); *Stockman* v. *John T. Clark & Son of Boston,* 539 F.2d 264 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977). *Dellaventura* clearly states that the Section 20(a) presumption is in-

applicable to "an interpretative question of general import such as . . . [coverage under Section 3, and that the Supreme] Court's decisions dealing with questions of coverage . . . will be searched in vain for mention of the presumption." 544 F.2d at 48. The court in *Stockman* came to the same conclusion when it stated "[t]his basic interpretative decision must precede any application of the presumption." 539 F.2d at 269. Although both courts were dealing with the Section 3 "situs" issue, "status" under Section 2(3) also involves the threshold issue of coverage.

An earlier Second Circuit case, *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291 (2d Cir. 1974), is cited as authority to the contrary. Particular reliance is placed on the court's statement that "so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Reliance on *McMullen* however is misplaced. The Second Circuit's later *Dellaventura* case, affirmed by the Supreme Court, is clearly entitled to more weight. Secondly, the court in *McMullen* also held that a "*prima facie* showing of federal jurisdiction" had been made, and thus the court did not totally rely on the Section 20(a) presumption.

We therefore decline to accept the proposition that the Section 20(a) presumption applies to the threshold issue of coverage, such as status under Section 2(3), in the context of these cases. Accordingly, the determination in *Sullivan* and *Sedmak* that the Section 20(a) presumption did not apply to the issue of status is affirmed.

II.

We now turn to the primary question with which we are confronted, namely, the boundaries of coverage under the Act.

Appendix F

The Act clearly sets forth a test for situs under Section 3(a)[1] and test for status under Section 2(3), both of which must be satisfied for coverage.[2] Since these appeals focus on the status of the claimants, we look to Section 2(3). Section 2(3) provides in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and and harborworker including a ship repairman, shipbuilder, and ship-breaker, . . .

The claimants herein were clearly not shipbuilders, shipbreakers, or ship repairmen. Nor could they be classified as longshoremen or as engaged in longshoring operations. Although Claimant Sullivan, a wire lather, on occasion helped to unload steel used in the construction of the substructure, Administrative Law Judge Feldman determined that that did not alter the essential nature of his occupation. We agree and add further that neither was Claimant Sullivan engaged in "indisputably" longshoring operations. Viewing Claimant Sullivan's overall activities, which has been the standard consistently applied by the Board, *see McNeil* v. *Prolerized New England Co.*, 8 BRBS 1, BRB

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[1] Section 3(a) states in pertinent part:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.)

[2] Claimants were found in each case to have satisfied the Section 3(a) situs test, except in *Sedmak* in which the issue was not addressed. The findings of situs are not on appeal.

Nos. 77-328 & 77-328A (March 20, 1978); *Coppolino* v. *International Terminal Operating Co., Inc.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974), he was a construction worker whose task of unloading the steel was an incidental function to his job of constructing the substructure.

The term "harbor worker", however, which is an occupation expressly covered by the Act, includes the occupations of shipbuilder, shipbreaker, and ship repairman, but is not limited thereto. Recognizing this fact, the Board, in *Stewart* v. *Brown & Root, Inc.*, 7 BRBS 356, 365, BRB No. 76-451 (Jan. 12, 1978), defined the term "harbor worker" to include "at least those persons directly involved in the construction, repair, alterations, or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." The claimants also cannot be deemed harbor workers under the *Stewart* rule. As noted previously, all of the claimants were involved in the construction of a substructure which was to be used as a foundation for a sewage disposal plant. Accordingly, their employment was not related to the "construction, repair, alteration, or maintenance of harbor facilities."

It is clear that in order for any of the claimants to satisfy the "status" test they must have been engaged in some form of "maritime employment" other than that expressly recognized in Section 2(3). As the Supreme Court acknowledged in *Caputo/Blundo*, the question of maritime employment *vel non* is made difficult by the failure of Congress to define it in the text of the Act or its legislative history. 432 U.S. at 265. This is due in part perhaps to the confusion surrounding this question since the Act's inception, as well as to the fact that in many of the earlier cases the precise

question before us was not in issue. *See, e.g., Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334 (1953), and cases cited therein, at 335-336. For example, in *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962), the employees were involved in the construction of vessels and thus the Court focused on the Maritime but Local issue and hence situs, rather than the maritime employment of the particular employees. Accordingly, in our attempt to ascertain maritime employment, we must rely in part on the considerations giving rise to the 1972 Amendments as well as those which should be taken into account in applying the Act, which were recently discussed by the Supreme Court in *Caputo/ Blundo.*

In approaching questions of status, the Supreme Court stated in *Caputo/Blundo* that we should take an expansive view of extended coverage and that the Act must be liberally construed. 432 U.S. at 268. The Court also pointed to the legislative history which establishes that by means of the 1972 Amendments, it was Congress' intent to create a "uniform compensation system to employees who would otherwise be covered by this Act for part of their activity," 432 U.S. at 272, and to accommodate the Act to modern technological change. 432 U.S. at 270. The Court however tempered these considerations by quoting other portions from the committee reports to the effect that the committee did not intend to cover employees not engaged in loading, unloading, repairing, or building a vessel just because they are injured over a covered situs. 432 U.S. at 266, n.27. Moreover, the Court favorably cited *Stockman* v. *John T. Clark & Son of Boston,* 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977). *Caputo/Blundo, id.* at 277, n.40, 281. In *Stockman,* the First Circuit examined the Act's legislative history and concluded that

> [the statement in the committee reports that the Act is to apply to employees who would be covered for part of their activity] as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harbor worker and the like.

Stockman, id. at 276.

In view of the foregoing, it is clear that injury over navigable waters in and of itself is an insufficient benchmark by which to ascertain maritime employment. *See Caputo/Blundo, supra; Thibodaux* v. *Atlantic Richfield Company*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978). Indeed, the Supreme Court clearly stated in *Caputo/Blundo*, 432 U.S. at 264-265, that

> [t]he 1972 Amendments thus changed what had been essentially only a "situs" test of eligibility for compensation to one looking to *both the "situs" of the injury and the status of the injured.* [Emphasis added.]

On the other hand, we continue to believe that the *Weyerhaeuser* test[3] for maritime employment under Section 2(3) is overly restrictive. In particular, we decline to accept the

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[3] *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961, 3 BRBS 140, 144 (9th Cir. 1976), *cert. denied*, 429 U.S. 868 (1976), (For status, an employee's work must "have a realistically significant relationship to traditional maritime activities involving navigation and commerce over navigable waters. . . [and specifically that] . . . an employee's employment have a realistic relationship to the traditional work and duties of a ship's service employment.")

proposition that the maritime employment must be of a "traditional" nature and have a "realistic relationship to the traditional work and duties of a ship's service employment." 528 F.2d at 96. The continued validity of the *Weyerhaeuser* test is questionable in light of *Caputo/Blundo*[4] and the Ninth Circuit's more recent approach to questions of status which is in accord with *Caputo/Blundo*. *See Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *Handcor, Inc.* v. *Director, Office of Workers' Compensation Programs*, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978).

Given the above considerations, we conclude that a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). *Cf. Anderson* v. *McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (April 7, 1977); *Toups* v. *Chevron Oil Company*, 7 BRBS 261, BRB No. 76-453 (Dec. 29, 1977). Since the claimants herein were engaged in the construction of a sewage disposal plant, their employment did not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. It follows that the claimants were not engaged in maritime employment pursuant to Section 2(3) and thus are not covered under the Act. We thus agree with the administrative law judge in *Sullivan* that Congress did not intend that the phrase "maritime employment" include a worker in the building or construction

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[4] In *Caputo/Blundo*, the Court, as noted above, acknowledged the Congressional intent to accommodate the Act by means of the 1972 Amendments to modern technological change. 432 U.S. at 270.

trades performing his usual function in the erection of any structure that *happened* to be situated upon navigable waters. To conclude otherwise would be to include under the Act a whole new group or class of employees not originally intended to be covered. Furthermore, to provide coverage to workers under the Act based solely upon injury over navigable water without regard to their individual status would be tantamount to the establishment of dual standards in the determination of jurisdiction. One standard for workers injured over navigable water and yet another for workers injured shoreside. The result is simply untenable.

The Director argues that all construction over navigable waters is maritime employment within the meaning of Section 2(3). As we noted above, the Act now requires that the tests of "situs" *and* "status" both be satisfied in order for an individual to be covered. To hold that any employment over navigable waters is sufficient for coverage would be to read out of the Act the "status" test, which we are not at liberty to do. We note further that two of the claimants were described as dock workers. Nevertheless, the label put upon an employee's activity or occupation is not dispositive of a determination of status. *See Jacksonville Shipyards, Inc.* v. *Perdue,* 539 F.2d 533, at 541, 4 BRBS 482, at 488 (5th Cir. 1976), *vacated and remanded,* 433 U.S. 904 (1977), *reaffirmed,* 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978). The Board's earlier Decision in *Sharp* v. *Pacific Gas & Electric Company,* 2 BRBS 381, BRB Nos. 75-170 & 75-170A (Oct. 30, 1975), is also used as authority to the contrary. To the extent that *Sharp* is inconsistent with our determination in these cases, it is overruled.

Further discussion however is in order. In *Stewart* v. *Brown & Root, Inc.,* 7 BRBS 356, BRB No. 76-451 (Jan.

12, 1978), we stated *inter alia* that if an employee was covered under the Act prior to the 1972 Amendments, the employee would similarly be covered after the amendments. *See also, Joyner* v. *Brown & Root, Inc.*, 7 BRBS 608, BRB Nos. 76-471 & 76-471A (Jan. 12, 1978). Upon reconsideration in light of the standards enunciated in this case, we have concluded that pre-amendment case law serves as a useful framework in which to ascertain maritime employment but that it is not controlling. *Compare Stewart* v. *Brown & Root, Inc., supra, with Weyerhaeuser Co.* v. *Gilmore, supra.* This is particularly so since under pre-amendment law,

> . . . so long as a work-related injury occurred on navigable waters and the injured worker was not a member of a narrowly defined class, the worker would be eligible for federal compensation *provided that his or her employer had at least one employee engaged in maritime employment.* [Emphasis added.]

Caputo/Blundo, 432 U.S. at 264. Thus, it is clear that coverage of claimants in pre-amendment cases did not necessarily depend on the individual claimant's work activity. *See Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334, 339-342 (1953). Consequently, all employees who were injured over pre-amendment navigable waters were not necessarily covered pre-amendment; if the employee was not employed by a statutory employer pursuant to Section 2(4), 33 U.S.C. §902(4) (1970 ed.), there was no coverage. *See Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117, n.4 (1962). However, in view of our determination that pre-amendment law is not controlling, we need not further address the issue.

Therefore, the Decisions and Orders of the administrative law judges in *Sullivan* and *Sedmak* are affirmed. The Decisions and Orders in *Fusco* and *McNulty* are reversed.

/s/ SAMUEL J. SMITH
SAMUEL J. SMITH, *Chairman*

I Concur:

/s/ ISMENE M. KALARIS
ISMENE M. KALARIS, *Member*

Dated this 30th day
of November, 1978.

MILLER, dissenting:

I respectfully but strongly dissent from my colleagues' holding that the claimants in these cases are not covered because they were not engaged in maritime employment. In reaching this conclusion, not only has the majority ignored numerous prior decisions of this Board that injuries sustained by employees over navigable waters[1] are covered under the Act, but also the clearly stated intent of Congress that all employees who would have been covered prior to the amendments would continue to be covered. Finally, my colleagues have ignored the long standing policy that the Act is to be liberally construed to carry out its beneficent purposes.

I

The rule that the Act is to be liberally construed finds expression in Section 20(a) of the Act, 33 U.S.C. §920(a), that in *any* proceeding for enforcement of a claim for

[1] "Navigable waters" in this dissent refers to pre-amendment navigable waters.

compensation it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the Act.

My colleagues have rejected the presumption as being inapplicable to these proceedings and rely on *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds, Caputo/Blundo, infra,* at pg. 7 and *Stockman* v. *John T. Clark & Son of Boston,* 539 F.2d 264 (1st Cir. 1976). However my colleagues have failed to perceive an essential distinction between those cases and the cases at bar. In *Dellaventura* and *Stockman,* the issue was the extent to which the 1972 amendments to the Act extended coverage to land-based employees. Until the 1972 amendments, the Act had been limited to injuries on the navigable waters, which included dry docks and marine railways. In the cases herein, the injuries were all sustained in an area which has historically and constitutionally[2] been an area of Federal jurisdiction.

Thus, in earlier cases both by the Supreme Court, *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), and the Second Circuit (which decided *Dellaventura, supra), Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291 (2d Cir. 1974); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640 (2d Cir. 1965), the Section 20 presumption was held to apply.

In fact, the Second Circuit held in *McMullen* "that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d, at pg. 1296. The Second Circuit repeated that rule in *Dellaventura* and went on to say:

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[2] See discussion on maritime and admiralty jurisdiction, *infra,* at p. 9.

> [H]ere the question is not whether a line established by Congress is sufficiently elastic to include the claimant. The main issue is whether Congress placed the line at the 'point of rest' or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border.

544 F.2d, at pg. 48.

In *Stockman,* the First Circuit perceived the issue in the case in the same manner as the Second Circuit. Since Congress drew no new lines seaward of the *Jensen* line, [see *infra,* pg. 10] coverage may reasonably be inferred.

In *Davis* v. *Department of Labor and Industries,* 317 U.S. 249, 256 (1942), the Supreme Court said:

> Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provisions of the federal act, 33 U.S.C. §920, which provides that in proceedings under that act, *jurisdiction is to be 'presumed,* in the absence of substantial evidence to the contrary.' [Emphasis added.]

Accordingly, I would hold, that when a case arguably falls within the jurisdiction of the Act, the Section 20 presumption will apply and unless there is substantial evidence to overcome the presumption the claim comes within the provisions of the Act. As all of the cases herein arguably fall within the Act's jurisdiction, I would find each of the claimants covered. However, even if there were no statutory presumption each of the claimants are entitled to benefits as I will clearly demonstrate.

Appendix F

II

The majority has concluded that to come within the Act's coverage "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." The majority finds support in *Anderson* v. *McBroom Rig Building, Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (April 7, 1977), and *Toups* v. *Chevron Oil Company*, 7 BRBS 261, BRB No. 76-453 (Dec. 29, 1977), both of which denied coverage to oil and gas field roustabouts who were injured on man-made islands. What the majority failed to note in relying on these cases was that the Supreme Court in *Rodrigue* v. *Aetna Casualty Co.*, 395 U.S. 352, at 364-365 (1969),[3] had held that such man-made islands were extensions of the state. Thus, the injuries sustained in *Anderson* and *Toups* were to *land based employees* and accordingly their status as "maritime employees" under the 1972 amendments, which extended coverage to certain classes of land based employees, had to be determined. The facts involved in the *Toups* and *McBroom* cases and the law applicable to land based injuries have no relationship to the issue of coverage for injuries sustained on navigable waters and are therefore clearly distinguishable.

III

Nevertheless, the majority has elected to construe the 1972 amendments in a manner which restricts coverage under the 1972 amendments to persons injured over the

[3] The *Rodrigue* case involved deaths on artificial island drilling rigs located on the Outer Continental Shelf which the Court held were not within the general admiralty jurisdiction. *Anderson* and *Toups* were injured on similar structures within state territorial waters.

navigable waters in the same manner as to persons injured on land. In so doing, they rely on *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977) (hereinafter *Caputo/Blundo*), which in their view supports their construction of the 1972 amendments. They do so despite the intention expressed by Congress that:

> Section 2(a) amends section 2(3) of the Act to define an "employee" as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* but retains that part of 2(3) which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net. [Emphasis added.]

S Rep at 16, HR Rep at 14.

Although Congress retained certain exceptions to coverage, such as masters, crew members, and persons engaged to load, unload, or repair vessels of less than eighteen tons, it explicitly noted those exceptions. The legislative intent not to exclude employees traditionally covered is therefore plain.[4]

In any event, to rely on *Caputo/Blundo* to deny coverage to these claimants is to ignore the language of the Supreme

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[4] Until recently, that has been accepted by the Board. *See, e.g., Stewart* v. *Brown & Root, Inc.*, 7 BRBS 356, 358-360, BRB No. 76-451 (Jan. 12, 1978); *Nelson* v. *Warren Brothers*, 7 BRBS 627, 632, BRB Nos. 76-414 and 76-414A (Jan. 24, 1978); *Hed* v. *Duncanson-Harrelson Co.*, 7 BRBS 821, 826, BRB No. 77-260 (Feb. 24, 1978); *Hatchett* v. *Duncanson-Harrelson Co.*, 8 BRBS 173, 174, BRB No. 77-487 (April 24, 1978).

Court in that decision. The opening paragraph sets forth the issue involved:

> In 1972 *Congress amended the Longshoremen's and Harbor Workers' Compensation Act*, (LHWCA) 33 U.S.C. §901 *et seq.* in substantial part to '*extend* [*the Act's*] *coverage to protect additional workers.*' S. Rep. No. 92-1125, 92 Cong. 2d Sess. (1972) In these consolidated cases we must determine whether respondents Caputo and Blundo, injured while working on the New York City waterfront, are entitled to compensation. To answer that question we must determine the reach of the 1972 amendments. [Emphasis added.]

432 U.S., at pgs. 251-252.

Caputo/Blundo, as the case indicates, involved claimants who would have been considered land based employees prior to the amendments and who were brought under the Act's coverage by the 1972 amendments. As the Court pointed out:

> This case also does not involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; *that is, workers who are injured on navigable waters as previously defined.* [Citation omitted.] [Emphasis added.][5]

432 U.S., at pg. 265, n.25.

For a better understanding of which employees were traditionally covered under the Act prior to the 1972 amend-

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[5] It is important to note that the Supreme Court recognized that coverage under the Act prior to the amendments merely required that an employment related injury occur on the 'navigable waters' as that term was understood prior to the amendments.

ments, a short history of the development of the maritime law in the United States will be helpful.

IV

Article III, Section 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

Mr. Justice Story fully explored the scope of the maritime and admiralty jurisdiction in the case of *De Lovio* v. *Boit, et al.*, 7 Fed. Cas. 418 (C.C.Mass. 1815). He concluded that "they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, *and to damages or injuries upon the sea.*" *De Lovio, supra,* at pg. 441. Mr. Justice Story further said:

> On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends *all* maritime contracts, *torts,* and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed or whatsoever may be the form of the stipulations.) which relate to the navigation, business or commerce of the sea. [Emphasis added.]

De Lovio, supra, at pg. 444.

Thus, it can be seen that from the earliest days the admiralty and maritime delegation by the Constitution has been interpreted as broad enough to encompass all injuries upon the navigable waters. Mr. Justice Story had earlier stated his view as to maritime jurisdiction in tort matters in

Thomas v. *Lane*, 23 Fed. Cas. 957, 960 (C.C.Me. 1813), a view adopted and expanded upon by the Supreme Court in *The Plymouth:*

> 'In regard to torts I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed any jurisdiction over torts, *except such as are maritime torts, that is torts upon the high seas* or on waters within ebb and flow of the tide.' Since the case of the *Genesee Chief*, 12 How. 443, navigable waters may be substituted for tide waters. This view of the jurisdiction over maritime torts has not been denied. [Emphasis added.]

The Plymouth, 70 U.S. (3 Wall) 20, 33, 18 L.Ed. 125, 128 (1865).

It is interesting to note that Mr. Justice Story equated tort upon the navigable waters with the term 'maritime tort.' *It is my opinion that Congress intended that the term 'maritime employment' be equated with employment on navigable waters.*

In *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 60 (1914), the Supreme Court stated:

> [E]very species of tort, however occurring, and whether aboard a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

In 1917, the Supreme Court in the case of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), held that the states could not constitutionally extend a compensation remedy to maritime workers since coverage by each state

would interfere with the uniformity and harmony of the general maritime law.[6]

Because of the *Jensen* case and its progeny, longshoremen and other harbor workers injured on navigable waters were left without any remedy under state compensation acts while their fellow workers injured on land were covered by state law. It was for this reason that Congress enacted the Longshoremen's Act. *See, Caputo/Blundo, supra,* at pg. 256.

However, in the period between *Jensen* (1917) and the Longshoremen's Act (1927), the Supreme Court began to retreat from its *Jensen* decision and established what became known as the 'maritime but local' doctrine. It held that some matters, though maritime in nature, were of local concern, and thus permitting local regulation would work no prejudice to the general maritime law. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469 (1922).

The *Rohde* case involved a claim for damages in admiralty by an employee (a carpenter) of a shipbuilding concern. He was working aboard a vessel which had been launched but was not ready for delivery at the time he sustained his injury. At the time, the State of Oregon had a workmen's compensation law in effect which gave both employers and employees the option to accept or reject the law; if notice was not given to reject the law, it was applicable. Neither the employee nor the employer rejected the law.

The Ninth Circuit certified two questions to the Supreme Court:

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[6] Later attempts by Congress to permit the several states to cover such employees were overturned by the Supreme Court. *See Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920) and *Washington* v. *W.C. Dawson & Co.,* 264 U.S. 219 (1924).

1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?
2. Is libellant entitled because of his injury to proceed against respondent in admiralty for the damages suffered?

257 U.S., at pg. 475.

The Supreme Court found that the contract for building the vessel was non-maritime and that *neither the employee's general employment, nor his activities at the time had any direct relationship to navigation and commerce.*[7]

It held that:

> [A]s both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law.

257 U.S., at pgs. 475-476.

However, the Court said:

> [C]onstruing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State, we answer, yes.

257 U.S., at pgs. 477-478.

Thus, although the Court found that the contract for construction of the ship was non-maritime, it found that

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[7] I emphasize the Court's language because it becomes important in the determination of Congressional intent in enacting the 1972 Amendments which will be dealt with later.

the injury sustained by claimant on navigable waters came within the general admiralty jurisdiction. Nevertheless, the Court found that to allow the claim to proceed under the state workmen's compensation law would not adversely affect the uniformity of the general maritime law and with it adopted the 'maritime but local' doctrine.[8]

By the time of the Act's enactment in 1927, the 'maritime but local' rule had become well established in the law.[9] However, this rule created problems for both employers and employees who could never be certain as to which law controlled. The Supreme Court, to resolve the dilemma, discussed what it referred to as "a twilight zone in which the employees must have their rights determined case by case." *Davis* v. *Department of Labor and Industries*, 317 U.S. 249, 256 (1942).

In that case, the employee, a structural steel worker, was drowned while engaged in dismantling a bridge over a river. His duties were to cut sections of steel from the bridge which sections were then lowered into a barge. He also worked on the barge, examining the sections of steel, and, when necessary, cutting them to proper length.

The State of Washington Compensation Act provided coverage to employees "engaged in maritime occupations for whom no right or obligation exists under the maritime laws." *Davis, id.* at pg. 252. The Court permitted the state act to apply relying on the presumption of constitutionality, although it was clear that had the claim been brought

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[8] At the time the Supreme Court adopted the 'maritime but local' doctrine there was no federal compensation law in effect.

[9] *See Miller's Indemnity Company* v. *Braud*, 270 U.S. 59 (1926); *See also Alaska Packers Association* v. *Industrial Accident Commission*, 276 U.S. 467 (1928), and cases cited therein, at pg. 469.

under the federal act, and an award been made, that award would have been sustained.

The Court in *Davis* referred back to *Parker* v. *Motor Boat Sales,* 314 U.S. 244 (1941), stating that in *Parker* "[W]e held that Congress has by the Longshoremen's Act accepted the *Jensen* line of demarcation between state and federal jurisdiction." 317 U.S., at pg. 256. That case involved an employee who generally worked as a janitor for a motor boat company who was sent out in a test run of a boat where he was to keep a lookout for hidden objects. The Court, in *Parker,* found that coverage under the Act was proper and held that the nature of his regular employment, as a janitor, was not important but that "habitual performance of other and different duties on land cannot alter the fact that at the time of the accident *he was riding in a boat on a navigable river and it is in connection with that clearly maritime activity that the award was made.*" (Emphasis added.) 314 U.S., at pg. 247.

The *Parker* case was again cited by the Supreme Court in *Pennsylvania Ry. Co.* v. *O'Rourke,* 344 U.S. 334 (1953). In *O'Rourke,* the issue was whether a railroad brakeman injured while on a barge on navigable waters could bring on action under the Federal Employers' Liability Act, 45 U.S.C. §951 *et seq.*

The Supreme Court traced the history of the law from *Jensen* to the enactment of the Longshore Act and said:

> *This act* and the Jones Act *provided means for indemnification for injuries of ... maritime employees who were beyond the constitutional reach of state legislation.* A quarter of a century of experience has not caused Congress to change the plan. The "*Jensen* line of demarcation between state and federal jurisdiction" has been accepted. [Citing *Davis, supra*].

> New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable waters. Therefore respondent comes within the coverage of that portion of §903(a) that includes those outside the reach of state compensation laws. [Emphasis added.]

344 U.S., at pg. 337.

The Court, concluding that the employee was engaged in maritime employment, held that the Court of Appeals, which found him not to be engaged in maritime employment within the meaning of the Act, was in error. The Court said that the Act does not require both injury on navigable waters and maritime employment.

However, a close reading of the Court's analysis indicates that it meant an employee did not have to be engaged in "traditional maritime employment" to come under the Act's coverage. At pg. 341, the Court said:

> [T]he result in Parker, as well, is totally inconsistent with any "duties test." Armistead, the employee there, was a janitor with the motor boat company. He had been ordered to ride in one of the boats during a test trip in order to keep a lookout for hidden objects. 314 U.S. at page 246, 62 S.Ct. at page 223. Compensation under the Harbor Workers' Act could not have been paid in connection with his death if we were to test its applicability by the nature of his regular work. A number of lower court cases are in similar vein. Those we collect in the margin deal with various types of construction and service workers, obviously not themselves engaged in traditional "maritime employment," if one were to look solely to the

particular type of job they were engaged for. [Footnote omitted.]

The Court was obviously making a distinction between 'traditional maritime employment' and employment over navigable waters which constituted maritime employment, since it began its discussion of the Act by noting that it "provided means for indemnification for injuries *for all maritime employees* who were beyond the constitutional reach of state legislation." (Emphasis added.)

This distinction was recognized by the four dissenting justices when they said:

> Was it maritime employment to get these cars off the car float or was it railroad employment? If this railroad employee had been doing his braking job on land, no one would have thought he was engaged in anything but railroad employment. Does it become maritime employment because it happened over navigable waters? We think not. The place is the only thing that differentiates the situations. Place is admittedly not enough to make what is braking on land other than braking when done over navigable waters. Not only must we look to the place where the accident happened, but of equal importance is the nature of the employment. The nature of the employment is certainly not maritime. It was an ordinary railroad chore, done by an ordinary railroad brakeman. If this were not so, the train crews on trains being ferried across navigable streams in the United States would be employed in maritime service. With the imagination of the Court's opinion, a train crew, while crossing a stream, would be employed in maritime service.

344 U.S., at pgs. 342-343.

In any event, the Supreme Court later concluded that irrespective of the 'maritime but local' rule, all employees injured in the course of their employment while over navigable waters were within the Act's coverage. *Calbeck* v. *Traveler's Insurance Company,* 370 U.S. 114 (1962). The Court emphasized that:

> [*t*]*here emerges from the complete legislative history a Congressional desire for a statute which would provide Federal Compensation for all injuries to employees on navigable waters; in every case, that is, where Jensen might have seemed to preclude State Compensation.* The statute's framers adopted this scheme because they meant to assure the existence of a compensation remedy for every such injury, without leaving the employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state Acts under the "local concern" doctrine. [Emphasis added.]

370 U.S., at pgs. 120-122. The Court concluded that:

> [I]n sum, it appears that the Longshoremen's Act was designed to assure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy.

370 U.S., at pg. 124.

Accordingly, although an employee who was injured during his employment over navigable waters, i.e., a maritime employee, might previously have been excluded from coverage under the Act due to the 'maritime but local'

doctrine, *Calbeck* declares that coverage is provided for all injuries to employees on navigable waters. It is therefore clear that the employees traditionally covered were those employees who sustained injuries in the course of their employment over navigable waters.

The Supreme Court thereafter held that coverage under the Act stopped at the water's edge and said "[T]he invitation to move that line must be addressed to Congress, not to this Court." *Nacirema Operating Company* v. *Johnson,* 396 U.S. 212, 224 (1969). *See also Victory Carriers Inc.* v. *Law,* 404 U.S. 202, 216 (1971).

That line was moved landward by the 1972 amendments. However, it can be seen from the foregoing that, at the time of the 1972 amendments, all injuries on navigable waters were within the Act's coverage except those cases specifically excluded by Subdivisions (1) and (2) of Section 903(a), 33 U.S.C. §903(a)(1) & (2).

V

We now turn to congressional intent in the enactment of the 1972 amendments. In doing so we find two things are certain. First, at least since *Calbeck, supra,* all injuries to employees injured on navigable waters have been within the Act's cognizance. Second, at the time of enactment of the 1972 amendments, the admiralty and maritime jurisdiction was believed to encompass all claims for injuries occurring on the navigable waters.

In *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 205-206 (1971), one of the decisions[10] leading to the Act's amendments, the Supreme Court said:

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[10] *See Nacirema Operating Co.* v. *Johnson, supra.*

> The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on navigable waters of the United States. Maritime contracts are differently viewed.[11]

At pg. 206, the Court stated:

> The maritime law was thought to reach [E]very species of tort, however occurring, and whether on board a vessel or not if upon the high seas or navigable waters . . . *Atlantic Transport Company* v. *Imbrovek*, 234 U.S. 52 (1914). But accidents on land were not within the maritime jurisdiction. . . .

The Court denied a claim for unseaworthiness and negligence under the general maritime law for a longshoreman injured on a pier holding that state law was applicable. It concluded:

> [I]f denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution.

404 U.S. at pg. 216.

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[11] Although workers' compensation is not based on any tort liability, being a form of liability without fault, and has been considered a hybrid of tort and contract, every injury sustained on navigable waters may give rise to a claim under the general maritime laws. Thus, *In re Motor Ship Pacific Carriers*, 489 F.2d 152, 156 (5th Cir. 1974), held that:

> It should be noted that in attempting to determine exactly what constitutes a tort for maritime jurisdictional purposes the *courts have generally made 'tort' synonymous with injury*. . . . [Emphasis added.]

Congress is presumed to have had knowledge of the law as it had been interpreted when it amended the Act.[12] *See Morisette* v. *United States,* 342 U.S. 246 (1952); *Shapiro* v. *United States,* 335 U.S. 1 (1948); *Baptiste* v. *Government of Virgin Islands,* 529 F.2d 100 (3rd Cir. 1976). Accordingly, all injuries sustained by employees on navigable waters are within the Act's coverage.

Three years after *Nacirema, supra,* and one year following *Victory Carriers* v. *Law, supra,* Congress addressed these problems and passed the 1972 amendments. The primary intent of the amendments was to increase federal benefits to employees covered under the Act and to prevent the bifurcated coverage with which maritime employees had to contend. *Caputo/Blundo,* 432 U.S., at pgs. 261-264. With respect to coverage, Congress expanded shoreside the covered 'situs' under Section 3(a)[13] and added the 'status' requirement under Section 2(3)[14] *as a limit to coverage for that shoreside area.* The foregoing is amply supported by a reading of both the House and Senate Committee Reports, which are identical:

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[12] In fact, the *Calbeck* decision which extended coverage to all injuries on navigable waters was before Congress in its entirety when it was considering the 1972 amendments. *See* Hearings on S. 2318, *et al.* before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong. 2d Sess. at p. 560 *et seq.*

[13] Section 3(a), 33 U.S.C. §903(a), now provides coverage for injuries sustained

> . . . upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

[14] For the text of Section 2(3), 33 U.S.C. §902(3), see page 9 of majority decision.

Appendix F

Extension of Coverage to Shoreside Areas

The present Act, insofar as longshoremen and ship builders and repairman are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1] 77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by as employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their

activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.*[15] Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. *Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.* [Emphasis added.]

S Rep 12-13, HR Rep No. 692, 1441, pgs. 10-11 (1972).[16]

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[15] The limitation imposed was clearly intended only on activities and employees in areas adjoining pre-amendment navigable waters.

[16] I have set forth the reasons behind the amendments to extend coverage, in full, to demonstrate the concerns of Congress with the

Appendix F

Caputo/Blundo was the first case in which the Supreme Court had occasion to view coverage under the amended Act and the Court applied the 'situs' and 'status' tests. The case, however, involved two shoreside employees and is not dispositive of the question before us. Nonetheless, the Supreme Court emphasized that

> [t]he language of the Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act "must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results." [Citation omitted.]

Caputo/Blundo, 432 U.S., at pg. 268.

Therefore, it is incongrous for the majority, which has strictly construed the amendments to deny benefits to these claimants and thereby relegate them to the inadequacy of state compensation laws, to find support in *Caputo/Blundo*.

VI

The majority, in total disregard of the Supreme Court's admonition that 'we should take an expansive view of the extended coverage,' and without any support either in the legislative history or the Act, has imposed a requirement that a claimant's employment bear a 'realistically significant relationship to maritime activities involving navigation and commerce over navigable waters.'

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disparity of benefits between longshoremen, shipbuilders and repairman, depending on which side of the water's edge an injury occurred and secondly with the inadequacy of state compensation laws, factors noted by the Supreme Court in *Caputo/Blundo*.

Appendix F

The definition which the majority seeks to apply to the term 'martime employment' was adopted from language in *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, at 961, 3 BRBS 140, at 144 (9th Cir. 1976), *cert. denied*, 249 U.S. 868 (1976). which in turn had adopted similar language from the Supreme Court's hc'ding in *Executive Jet Aviation* v. *Cleveland*, 409 U.S. 249, at 268 (1972).[17]

In *Executive Jet*, the Supreme Court was faced with a claim for damages by the owner of an aircraft which crashed into Lake Erie. The issue was whether the claim was cognizable in admiralty. The Court began its discussion:

> Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; . . . .

409 U.S., pg. 253.

The Court then cited Mr. Justice Story's language in *Thomas* v. *Lane*, *supra*, and language from *The Plymouth*, *supra*, that:

> ". . . Every species of tort however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

409 U.S., pg. 254.

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[17] *Executive Jet* was decided two months after the enactment date of the 1972 amendments and therefore could have played no part in congressional intent as to the meaning of 'maritime employment.'

Then, citing *Victory Carriers Inc.* v. *Law, supra*, the Court reiterated its statement that:

> [t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.

409 U.S., at pg. 254.

The Court then discussed the problems inherent in trying to apply a situs test to tort cases involving aircraft and concluded:

> It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

409 U.S., at pg. 268.

The Court made clear throughout the decision, however, that its decision was aimed at aviation cases and that it was not eliminating or overruling prior law as to situs on navigable waters as the predicate for maritime jurisdiction.[18]

VII

In adopting its 'significant relationship to maritime activities' definition for maritime employment the majority

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[18] *See Edynak* v. *Atlantic Shipping, Inc.*, 562 F.2d 215, 220 (3rd Cir. 1977), in which the court emphasized that "[T]he language of Justice Stewart's opinion [in *Executive Jet*] was strictly limited to accidents involving aircraft. . . ."

has reasoned that "to conclude otherwise would be to include under the Act a whole new group of class of employees not originally intended to be covered."

A simple response to the majority's conclusion is to quote from the Supreme Court in *Caputo/Blundo, supra,* when the Court rejected an attempt to limit coverage under the Act to land-based employees by a 'point of rest' theory. The Court said:

> We too reject it. A theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage is incapable of defeating our conclusion that Blundo and Caputo are "employees."

Caputo/Blundo, supra at pg. 278.

Similarly, the 'significant relationship to maritime activities' definition for 'maritime employment' espoused by the majority must also be rejected, for as stated, it nowhere appears in the Act or the legislative history; it does not comport with Congress' expression of its intent not to exclude other employees traditionally covered; and it is being used to restrict coverage of a remedial Act that was designed only to expand coverage. Therefore, it should not be used as a vehicle to defeat coverage for the claimants herein.

VIII

Rather than the restrictive view of 'maritime employment' espoused by the majority, the amendments clearly reflect the intent of Congress to establish a much broader view of its meaning. As discussed earlier, *supra,* at pgs.

12-13, employees engaged in new ship construction were not considered to be engaged in maritime employment. The Supreme Court in the *Rohde* case, *supra*, 257 U.S., at pg. 475, said, and I again repeat the Court's language:

> The contract for constructing "The Ahala" was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, *neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce.* [Emphasis added.]

Thus, it can be said that the activities of employees engaged in new ship construction have no 'realistically significant relationship to navigation and commerce.' Nevertheless, Congress has specifically included these employees within the scope of 'maritime employment.' Therefore, it is reasonable to conclude that Congress intended to give the broadest possible scope to the meaning of 'maritime employment' when it used that phrase in the 1972 amendments.

Further, by including shipbuilders within the scope of 'maritime employment,' Congress at least by implication has rejected the requirement that the activities of employees on navigable waters bear a 'realistically significant relationship to navigation and commerce,' a requirement that can only lead to confusion and delay in the administration of the Act.

Neither of my colleagues has attempted to define the standard which we, the administrative law judges, and the deputy commissioners are expected to apply in considering claims under the Act. This is easy to understand because there is no uniform standard which can be applied.

The Supreme Court long ago said that:

> What work has direct relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise.

John Baizley Iron Works v. *Span*, 281 U.S. 222, at pg. 230 (1930).

In *Kelly* v. *Smith*, 485 F.2d 520, 525 (5th Cir. 1973), the court set forth the factors to be used in making a determination as required by *Executive Jet* in aviation cases and by the majority in cases involving injuries over navigable waters under the Act:[19]

> These are: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law.

Mr. Justice Frankfurter, in his concurring opinion in *Davis* v. *Department of Labor and Industries*, *supra*, said:

> [A]ny legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement.

317 U.S., at pg. 258.

I submit that to adopt the majority's standard of coverage, however it may be measured, will once again open the floodgates of litigation on issues long since laid to rest and will re-establish that area of confusion and uncertainty known as the 'twilight zone'.

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[19] The factors set forth in *Kelly* v. *Smith*, *supra*, have been adopted by the Ninth Circuit in *T.J. Falgout Boats, Inc.* v. *United States*, 508 F.2d 855, 857 (1974); the Eighth Circuit in *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973, 978 and *Edynak* v. *Atlantic Shipping, Inc.*, *supra*, at pg. 221.

IX

Assuming however, that my colleagues are correct and that an employee's duties must bear a 'realistically significant relationship to maritime activities including navigation and commerce,' each of the claimants would still be entitled to coverage under the Act.

In these four cases the claimants were all engaged in employment over navigable waters which involved job functions and responsibilities virtually identical to those performed by workers involved in the construction of docks, piers, wharves, bridges and other structures over and upon navigable waters. Indeed, two of the claimants were described, and accurately I believe, as dock builders. Each claimant was exposed to the same type of risk and hazard and subjected to a type of accident similar to that experienced by other maritime workers over navigable waters. In similar situations, the Board has held that the employees were covered. *See, e.g., Hed* v. *Duncanson-Harrelson Co.*, 7 BRBS 821, BRB No. 77-260 (Feb. 24, 1978); *Hunter* v. *Duncanson-Harrelson Co.*, 8 BRBS 83, BRB No. 77-433 (March 30, 1978); *Hatchett* v. *Duncanson-Harrelson Co.*, 8 BRBS 173, BRB No. 77-487 (April 24, 1978).

There have also been numerous court decisions involving the status of employees engaged in employment similar to that of the employees herein. The issue in those cases are *not whether the particular employee was engaged in maritime employment, but whether he was a seaman* within the Jones Act,[20] or entitled to sue on an admiralty claim for unseaworthiness of the vessel.

The case most pertinent to the issue at hand is that of *Stafford* v. *Perini Corp.*, 475 F.2d 507 (1st Cir. 1973), since

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[20] 46 U.S.C. §688 which gives a member of a crew a cause of action for negligence.

Appendix F

Perini Corp is one of the members of the joint venture known as Perini North River Associates, the employer involved in these proceedings. (*See* Transcript in *Sedmak* at pg. 25).

That case involved a claim under the Jones Act and under the general maritime law for unseaworthiness. The Court described the facts involved as follows:

> At the time of the accident, Stafford was employed as a dock-builder in Perini Corporation, which was then engaged in the construction of the Newport Bridge in Rhode Island. One of Stafford's principal duties in this capacity was to build and repair certain "forms" which were used for the pouring of concrete in erecting the piers of the bridge. This work was generally done on the deck of a barge owned by Perini (Scow 101), which was located about two miles offshore in Narragansett Bay. The barge also served as a storage area for various materials and carried a large crane which was used for the purpose of lifting the forms back and forth from the deck to the piers. In addition to building and repairing the forms, Stafford did various construction work on the piers themselves and also assisted in moving the barge from one site to another by handling its mooring and towing lines.[21]

475 F.2d, at pg. 509.

Perini argued on appeal that the employee did not qualify as a member of the crew. The Court of Appeals affirmed a judgment in favor of the employee, stating:

> We cannot agree with this assessment of the evidence. Contrary to appellant's assertion that plaintiff's work

[21] Compare description of duties of Stafford to those of claimants herein.

> was done almost exclusively on the piers, the record clearly indicates that a significant part of his job was to build and renovate the forms used in connection with the pier's construction. According to appellant's own witness, this work was done on the deck of Scow 101. There was also testimony that on the day of the accident, Stafford spent at least four hours on board the barge. In light of this evidence, we cannot say, as a matter of law, that plaintiff did not perform a substantial part of this work on Scow 101. Moreover, since one of the primary functions of the vessel was apparently to provide a work area for the construction of the forms, it is clear that Stafford's duties directly related to the performance of its mission. The question as to plaintiff's crew-member status, therefore, was for the jury. *Compare Grimes* v. *Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed. 737 (1958); *Butler* v. *Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958); *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966).

475 F.2d, at pg. 510.

The *Grimes* case involved a pile driver who had assisted in construction of a tower. When the tower was towed to sea, Grimes and twenty-five other workers lived on it and kept it in condition. After the tower was anchored at its permanent site, Grimes performed only pile driving. He was drowned when he fell out of a life ring used to carry him from a tug to the tower. The Supreme Court reversed the First Circuit's decision, at 245 F.2d 437, and held that there was sufficient evidence presented for a jury's finding whether or not Grimes was a member of the crew of any vessel. 356 U.S., at pg. 253.

Appendix F

In *Offshore Company* v. *Robison,* 266 F.2d 769 (5th Cir. 1959) the Fifth Circuit, referring to the Supreme Court's decision in *Grimes* said:

> *Shortly after deciding that a worker driving piles might be a seaman,* the Supreme Court decided that an employee doing odd jobs around his employer's wharf might also be a seaman. . . . [Emphasis added.]

266 F.2d, at pg. 778.

The *Robison* case involved an award for injuries sustained by a roughneck (a driller's helper, a laborer in a drilling crew who does the hard general work in the rigging and drilling of a well). He had never worked as a seaman on board a vessel, as the terms 'seaman' and 'vessel' are understood. He never had a seaman's papers. Offshore was in the business of drilling and exploring for oil and owned and operated a drilling rig which was mounted on a mobile drilling platform which Robison called a barge. At the time of the accident it was resting firmly on the bottom of the Gulf of Mexico. A recovery was had under the Jones Act. 266 F.2d, at pg. 772-773.

On appeal the Court phrased the issues as:

> 1. What is required in law to constitute *a maritime worker a seaman* and member of the crew? [Emphasis added.]
>
> 2. In the circumstances of this case, is the question one for the court or for the jury?

266 F.2d, at pg. 773. [It should be noted that the Court characterized the employee as a maritime worker, i.e. one engaged in maritime employment.]

The Court affirmed the award and the finding that claimant was a seaman.

In *Lewis* v. *Roland E. Trego & Sons,* 501 F.2d 372 (4th Cir. 1974), plaintiff Lewis, a marine construction worker, was a general laborer hired to work on the employer's pile driver and barges. The employer was a marine contractor.

The employee was injured by an over-turned scaffold that had been erected to enable him and other workmen to place headers atop piles for the construction of a boathouse. 501 F.2d, at pg. 373.

The District Court found that Lewis had no seaman's papers, was not assigned to any particular vessel, rarely accompanied a barge as it was being moved, slept ashore and performed ninety percent of his work on land and went aboard a vessel only when his construction work required him to be on the water.

The District Court concluded that Lewis was not a member of the crew and therefore, could not sue under the Jones Act or under the general admiralty law. However, the District Court did find that Lewis was contributing to the barge's essential mission when he was injured.

The Court of Appeals vacated that part of the decision denying the claim for unseaworthiness and said:

> There can be no doubt about the adequacy of the evidence to support the court's finding that Lewis was contributing to the barge's essential mission when he was injured. This finding alone appears to establish his status conclusively. *One who works aboard a ship in navigation is usually considered to be a seaman if his duties are essential to some purpose of the vessel. Lawrence* v. *Norfolk Dredging Company,* 319 F.2d 805,

808 (4th Cir. 1963); *Gahagan Construction Corp.* v. *Armao,* 165 F.2d 301, 305 (1st Cir. 1948). The work need not be in actual aid of navigation. *Carumbo* v. *Cape Cod. S.S. Co.,* 123 F.2d 991, 994 (1st Cir. 1941). [Emphasis added.]

501 F.2d at pg. 374.

The Supreme Court, however, has repeatedly held that a person transitorily aboard a vessel is entitled to a warranty of seaworthiness if he is performing the work of a seaman. *Seas Shipping* v. *Sieracki, supra.* [328 U.S. 85]; *Pope and Talbott, Inc.* v. *Hawn,* 346 U.S. 406, 412. . . . The fact that ninety percent of Lewis' work was on land does not detract from the maritime nature of his duties afloat. [Emphasis added.]

• • •

We have held that construction workers on scows or barges who were engaged in building structures which were extensions of land were seamen. *Biggs* v. *Norfolk Dredging Co.,* 360 F.2d 360, 362 (4th Cir. 1966) (construction laborer putting caps on bridge piles); *Summerlin* v. *Mossman Construction Co.,* 199 F.2d 715 (4th Cir. 1952) (crane fireman on barge building bridge); *Leary Construction Co.* v. *Matson,* 272 F. 461, 463 (4th Cir. 1921) (winchman on pile-driver scow building dock); *see also Spratley* v. *Tidewater Construction Co.,* 238 F. Supp. 650 (E.D.Va. 1965) (laborer on barge building bridge). Other courts have reached this conclusion in similar circumstances. *See, e.g., Stafford* v. *Perini Corp.,* 475 F.2d 507 (1st Cir. 1973) (cement-form carpenter on offshore construction barge); see also 1 Norris, The Law of Seaman, §§17, 21 (1970). These cases dealt with the application of

> the Jones Act and the status of the employees as crew members. In this respect, of course, they are not controlling. *They illustrate, however, that construction employees working on vessels in bays and harbors are seamen*[.] The work that the successful claimants in these cases performed was indistinguishable from the work that Lewis was doing. Historically, both Congress and courts of admiralty have drawn a distinction between purely terrestrial injuries and those occuring on navigable water. *See Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 222, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969). We find no warrant for considering an injury which took place on a construction vessel in navigable waters as an injury occurring on land either because the structure being built over the water will be an extension of the land or because the injured worker who was assigned a place of work on the vessel normally performed most of his work on land. [Emphasis added.]

501 F.2d, at pg. 375.

Considering the above mentioned cases and the others cited therein, there should be no doubt that the claimants herein are at the very least engaged in occupations having a realistically significant relationship to maritime activities involving navigation and commerce and are therefore engaged in 'maritime employment'.[22]

---

[22] A recent decision of the Fifth Circuit, *Thibodaux* v. *Atlantic Richfield Co.,* 580 F.2d 841 (5th Cir. 1978), found that an employee being transported to a fixed offshore drilling platform at which he was to work was not a maritime employee. The court found that he had no duties to perform on the navigable waters and was not among those categories enumerated as maritime employees in the Act. The court found that: [T]he deceased was simply not the amphibious worker sought to be protected by the

Appendix F

X

I think it appropriate, in concluding to quote the Second Circuit in *Igneri* v. *Cie de Transports Oceaniques,* 323 F.2d 257, 267 (2d Cir. 1963):

> Here Congress has utilized its constitutional power "to alter, qualify, or supplement" the maritime law "as experience or changing conditions might require," *Panama R. R. Co.* v. *Johnson,* 264 U.S. 375, 386, 44 S.Ct. 391, 393-394, 68 L.Ed. 748 (1924). *Its action in doing so "must not be read in a spirit of mutilating narrowness"; the courts must give " 'hospitable scope' to Congressional purpose even when meticulous words are lacking."* *United States* v. *Hutcheson,* 312 U.S. 219, 235, 61 S.Ct. 463, 467-468, 85 L.Ed. 788 (1941). [Emphasis added.]

Dated this 12th day
of January, 1979.

1972 amendments to the LHWCA because his work was performed on land. The locality of the work sites fortuitously rendered it necessary to travel over the water. 580 F.2d, at pg. 845. [The employees herein are amphibious workers and performed their duties on the navigable waters.]

APPENDIX G

Decision and Order of the Administrative Law Judge in the Case of Ronald Fusco

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-LHCA-927

OWCP No. 2-41544

In the Matter of

RONALD C. FUSCO,

Claimant,

v.

PERINI NORTH RIVER ASSOCIATES,

Employer,

HARTFORD INSURANCE COMPANY,

Carrier,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party In Interest.

BERNARD S. EPSTEIN, Esquire
450 Seventh Avenue
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For the Claimant

Appendix G

WILLIAM F. FISCHER, JR., Esquire
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For the Employer/Carrier

LAURIE M. STREETER, Esquire
Associate Solicitor of Labor
For Director, OWCP

Before:

PHILIP J. LESSER
Administrative Law Judge

DECISION AND ORDER

This is a claim for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*), herein referred to as the "Act".

This has been a vigorously contested case involving the testimony of numerous witnesses, the introduction of numerous exhibits and the submission of excellent and helpful briefs by counsel for the Claimant and counsel for the Employer and Carrier. The Claimant is admittedly permanently and totally disabled and has been since January 8, 1975 when he allegedly sustained a head injury in the course of his employment. The Employer and Carrier have controverted the claim contending (1) that the Claimant did not in fact sustain a head injury in the course of his employment on January 8, 1975, (2) that his disability, which they admit is permanent and total, is not due to any accidental injury, but rather is due to an idiopathic cerebrovascular incident, (3) that proper notice of the injury was not given in accordance with the requirements of the Act,

and (4) that the Claimant's employment at the time of the alleged injury did not come within the coverage of the Act.

The Claimant was a construction laborer employed to work on the construction of a substructure of a sewage disposal plant on the Hudson River at 133rd Street, in Manhattan, New York City. The substructure extends up and down the river's edge a distance of approximately 2,000 feet and extends out from the shore over the river itself a distance of approximately 200 feet over its entire shoreside length. A number of barges, tugboats and floating stages (rafts) are used in connection with its construction. The Claimant worked on floating stages assisting the so-called "dock builders" in the construction of the substructure, performing such tasks as fetching materials from barges or from the shore, assisting in the driving of caissons into the river bed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct platforms across those beams. The Claimant and others frequently wore life jackets because of the risk of falling into the river in the course of their work.

On January 8, 1975, the date of the alleged accident, the Claimant sustained a subdural hematoma (brain hemorrhage) with later complications of a brain abscess and osteomylitis of the skull. Because of the nature of his condition he has no present recollection of the events of that day. However, one witness did observe the Claimant climbing down a ladder from one of the concrete forms down to a raft below; the witness saw the ladder twist and the Claimant suddenly disappear from sight. The witness went over to the Claimant, saw him get up from where he apparently had fallen and look for his helmet. Another witness, working nearby, heard a noise and turned around to

see the Claimant get up and brush himself off, looking somewhat stunned. Immediately following his fall the Claimant complained of not feeling well and drove himself home after telling a fellow employee to inform the foreman that he had fallen from a ladder, injured himself and had gone home. The foreman himself testified that he was told that evening by one of the Claimant's fellow employees that the Claimant had injured himself and had gone home.

That evening the Claimant complained of a headache and went to bed early. At 11:30 p.m., he appeared to his wife to be quite ill, gasping for breath and in a coma from which he could not be aroused. He was taken by ambulance to the hospital where his condition was diagnosed as a subdural hematoma and brain lobe contusion in the subtemporal area on the left side. The history on admission, given to the hospital by the Claimant's wife who testified that she had obtained it from the Claimant earlier that day upon his arrival home from work, was that he had fallen from a six foot ladder at 3:00 p.m., on that day and had a momentary loss of consciousness. That history and the testimony of the witnesses who saw the Claimant immediately after the accident, coupled with the diagnosis of a brain contusion in the left temporal and frontal area, leads most reasonably to the conclusion that the Claimant struck the left side of his head against the side of the concrete form when falling from the ladder. There is nothing in any of the 31 pages of the hospital record or in any of the medical reports to indicate that the Claimant's brain contusion and hemorrhage was idiopathic. On the contrary, the hospital record and medical reports all appear to implicate trauma to the Claimant's head as the cause of his condition.

In these circumstances it is "a mere quibble" for the Employer and Carrier to argue that the Claimant did not

injure his head in falling from the ladder merely because there are no witnesses to testify to that fact. See *Hancock* v. *Einbinder, Deputy Commissioner,* 310 F.2d 872 (C.A., D.C., 1962). The Claimant's head injury may fairly be inferred from all of the circumstances here.

The contention of the Employer and Carrier that the Claimant failed to give notice of his injury is refuted by the testimony of the Employer's labor foreman who testified that he knew of the Claimant's accident on the evening of the day of its occurrence. The fact that the foreman did not prepare the usual written accident report does not negate the Employer's imputed knowledge of the accident through its foreman as its agent. Nor has it been shown that the Employer and Carrier were prejudiced in any way by the Claimant's failure to give written notice as required by the Act. Indeed, his medical condition was such that his failure to give written notice within thirty days of the accident must be excused. See Section 12(d)(1)(2) of the Act.

The only remaining question for adjudication is whether the Claimant was "engaged in maritime employment" in order to avail himself of coverage under the Act. I cannot assume, as some of my colleagues do, that the term "maritime employment" refers only to those old and familiar occupations and activities which were *traditionally associated with ships and the sea.* To so hold is to say that the law remains static and that the Act must be frequently updated in order to specifically designate every new, non-traditional maritime occupation sought to be covered by the Act. But the Courts have already held that the term "maritime employment" includes such non-traditionally maritime activities as, for example, the construction of a river diversion tunnel in connection with the building of a

dam (*Morrison-Knudsen Co.* v. *O'Leary, Deputy Commissioner,* 288 F.2d 542 (C.A. 9, 1961)), the operation of a crane in connection with the construction of a bridge (*Dixon* v. *Oosting, Deputy Commissioner,* 238 F. Supp. 25 (D.C. Va., 1965)), and the activities of a steelworker and of a crane operator in dismantling a bridge (*Davis* v. *Dep't of Labor and Industries,* 317 U.S. 249 (U.S. Sup. Ct., 1942)) and *Peter* v. *Arrien, Deputy Commissioner,* 463 F.2d 252 (C.A. 3, 1972). And it has been held by the Benefits Review Board in affirming an Administrative Law Judge decision that an engineer was engaged in "maritime employment" while in a scuba diving training program for the purpose of inspecting underwater facilities of a public utility company (*Kenneth C. Sharp* v. *Pacific Gas & Electric Company,* 2 BRBS 381, 10/30/75). I have no hesitancy in concluding that a construction laborer who works on a raft to help construct a fixed structure lying directly above the water, is just as much engaged in maritime employment as a marine diver who inspects fixed structures lying below the water.

Findings of Fact and Conclusions of Law

1. On January 8, 1975 the Claimant sustained an accidental injury arising out of and in the course of his employment with the Respondent-Employer when he fell while descending a ladder, and, in falling, he struck the left side of his head against a concrete form. At the time of his injury the Claimant's average weekly wage was $362.85.

2. At the time of his injury the Claimant was employed as a construction laborer engaged in the construction of a substructure for a sewage disposal plant over navigable waters, which employment was within the coverage of the Act.

3. The Claimant did not give written notice of injury as required by the Act. However, through its labor foreman, the Employer had actual knowledge of the Claimant's injury, and it has not been prejudiced by the Claimant's failure to give written notice. Further, in view of the medical condition of the Claimant, it is found that he could not have given written notice and therefore the giving of written notice is excused in accordance with the provisions of the Act.

4. As a result of the said accident the Claimant sustained a brain contusion and subdural hematoma with later complications of a brain abscess and osteomylitis of the skull. As a result he has been permanently and totally disabled from the date of the accident.

5. The Claimant's attorney has requested approval of a fee of $15,000.00 for his legal services on behalf of the Claimant in connection with this matter which extended over a period of almost two years. In support of his request he has submitted a detailed itemization indicating the date and the nature of each service performed. Pursuant to the criteria specified in the Regulations implementing the Act, the amount of work done by a Claimant's attorney is only one of a number of factors which must be considered in approving a legal fee. The Regulations specifically require that any fee approved "shall take into account . . . the amount of benefits involved." In this connection it has been held to be improper to fail to consider the amount of benefits which the attorney's efforts have been able to obtain for his client. *Linnell, Choate and Webber* v. *Heyde, Deputy Commissioner*, 330 F. Supp. 170 (D.C., Me., 1971). Although the regulations prohibit an attorney from con-

tracting with his client for the payment of a contingent fee, they do not prohibit the approval of a fee contingent upon recovery (*Director, Office of Workers' Compensation Programs* v. *Hemingway Transport, Inc.*, 1 BRBS 73 (8/6/74) or upon the amount of the recovery (Regulations, sections 702.132 and 702.134(b)). In this case the Claimant's attorney has succeeded in obtaining compensation benefits for his client which, on the basis of the Claimant's life expectancy will amount to considerably more than half a million dollars plus the contingency of continuing payments to the Claimant's wife upon the Claimant's death from whatever cause (See Section 9 of the Act). Accordingly, I find the proposed fee of $15,000.00 to be reasonable and it is therefore approved.

ORDER

It is therefore ordered that:

1. The Respondents shall pay to the Claimant compensation for permanent total disability at the rate of $241.90 per week (two-thirds of the Claimant's average weekly wage at the time of his injury) beginning January 9, 1975 to the present date and continuing hereafter subject to the provisions of the Act, and further subject to the upward annual adjustments in the rate of compensation as required by the Act in cases of permanent total disability.

2. The Respondents shall take credit for any compensation which they may have paid to the Claimant under the New York State Workmen's Compensation Law on account of his disability due to his injury of January 8, 1975 and they shall pay interest to the Claimant on the balance of compensation which they owe to him pursuant to this Order at the rate of six percent per annum computed from the date

that each such payment was originally due until the date of actual payment.

3. The Respondents shall further pay to the Claimant's attorney, Bernard S. Epstein, Esq., the sum of $15,000.00 for his legal fee plus the sum of $47.00 for his costs in connection with this case, which sums shall be paid in addition to the compensation awarded to the Claimant.

/s/ PHILIP J. LESSER
PHILIP J. LESSER
Administrative Law Judge

Dated: December 19, 1977
Washington, D.C.

APPENDIX H

Decision and Order of the Administrative Law Judge in the Case of Bernard Sullivan

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 77-LHCA-85
OWCP No. 2-42432

In the Matter of

BERNARD SULLIVAN,

Claimant,

v.

PERINI NORTH RIVER ASSOCIATES,

Employer,

HARTFORD ACCIDENT & INDEMNITY CO.,

Carrier.

Joseph F. Klotz, Esq.
50 East 42nd Street
New York, New York 10017
For the Claimant

William F. Fischer, Esq.
Fischer Brothers
90 John Street
New York, New York 10017
For the Employer and Carrier

Appendix H

Before:

ROBERT J. FELDMAN
Administrative Law Judge

DECISION AND ORDER

Claimant seeks compensation for disability under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.* as amended) hereafter referred to as "the Act".

Preliminary Statement

Though I ordinarily eschew prefatory recitals of the steps taken by the respective parties in the course of proceedings, it is not inappropriate in this instance to note the circumstances surrounding the hearing. Despite a clear statement of the issues set forth in the Deputy Commissioner's referral memorandum, reinforced by the Calendar Judge's pointed reminder to counsel some five weeks before the hearing that both jurisdiction and continuing temporary total disability were in issue, it became apparent at the outset of the hearing that neither party was prepared to present admissible evidence on both issues. Instead of an application to postpone the hearing, a request was made to bifurcate the proceedings by trying and determining a single issue, and then, if necessary, holding a new hearing at a later date on the remaining question. That request was promptly and properly denied. Nevertheless, an extended recess of more than two hours was directed in order to provide counsel with the opportunity to obtain testimonial or documentary proof in support of their contentions. Except for some medical reports and related documents (obtained from the State Compensation Board rather than

from the Deputy Commissioner's office), however, neither counsel saw fit to produce any further evidence.

Although not participating in the hearing, the Solicitor of Labor filed a post-hearing brief on behalf of the Director, Office of Workers' Compensation Programs. The Solicitor supports jurisdiction of the claim upon the ground that the Employer and Carrier failed to furnish substantial evidence to rebut the presumption of coverage contained in Section 20(a) of the Act. In his reply brief, counsel for the Employer and Carrier carefully reviews the legislative history of the 1972 amendments to the Act and some of the pertinent interpretations of the statutory phrase "maritime employment", but studiously avoids any mention of the presumption of coverage.

Findings of Fact

The following facts are not in dispute:

1. On September 11, 1975, Claimant was accidentally injured while in the employ of the Employer, his injury arising out of and in the course of his employment.

2. Claimant's average weekly wage at the time of injury was $350.00.

3. As a result of his injury, Claimant was temporarily totally disabled from September 12, 1975 to November 21, 1975, for which he was paid compensation of $125.00 per week at New York State rates for a total of $1,250.00.

4. Claimant was also temporarily partially disabled from November 21, 1975 to June 22, 1976, for which he was paid compensation of $95.00 per week at New York State rates for a total of $2,907.00.

5. Claimant has thus been paid an aggregate of $4,157.00 as compensation on account of said injury.

6. The Employer had due notice of the injury; the claim was timely filed; and notice of controversion was timely filed.

The following additional facts appear from the evidence:

7. At the time of the accident Claimant was employed as a wire lather and his principal duties were the steel reinforcement of concrete.

8. The project upon which he was employed was the construction of a foundation or substructure for a sewage disposal plant in the Hudson River.

9. The operations in which Claimant was directly involved were: (a) the building and filling of caissons (large cylinders sunk upright into the water) into which steel reenforcing rods were inserted before the caissons were filled with concrete; and (b) re-enforcing horizontal beams hanging over the water from caisson to caisson.

10. While working on beams at high tide, Claimant and other lathers would frequently be standing in water.

11. Two or three times a week Claimant and other lathers went aboard barges to unload steel rods or to prepare such rods to be moved by cranes that were aboard some of the barges.

12. At the time of the accident, Claimant was installing beams about 150 feet from the shore and was standing about 12 inches above the water.

13. As a result of the accident, Claimant suffered a low back injury variously described as intervertebral disc lesion, nerve root irritation, acute lumbosacral spine strain

and sprain, or herniated lumbar disc; and most frequently evaluated as causing mild to moderate partial disability.

Conclusions of Law

There is no doubt that the situs requirements for coverage under the Act have been met, Claimant having been injured while at work upon navigable waters. Nor can there be any serious doubt that the Employer meets the requirements of Section 2(4) of the Act in that at least some of its employees are engaged in maritime employment. See, for example, *Clefstad* v. *Perini North River Associates,* 77 LHCA 404, July 27, 1977. The real question is whether Claimant was engaged in maritime employment within the meaning of Section 2(3) of the Act and if he is aided in the determination of that issue by Section 20(a) stating that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act.

In view of the paucity of proof as to the operations in which Claimant participated, the availability of the statutory presumption becomes a crucial factor in the resolution of the controversy. Since the Employer and Carrier rested on Claimant's testimony without introducing any affirmative proof in support of their defense of lack of jurisdiction, the presumption, if applicable, would not be rebutted unless Claimant had provided sufficient competent evidence to place his claim outside of the recognized coverage of the Act. Cf. *St. Louis Shipbuilding Co.* v. *Director, O.W.C.P.,* 551 F.2d 1119 (8th Cir. 1977). Determination of the issue need not depend upon the weight or sufficiency of Claimant's testimony, however, if the presumption may not be availed of as a matter of law.

Appendix H

Essentially, we are trying to ascertain whether Congress intended that the phrase "maritime employment" was to include a worker in the building and construction trades performing his usual function in the erection of a structure that happened to be situated upon navigable waters. This basic interpretative question must precede any application of the presumption. See *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 48 (2nd Cir. 1976); *Stockman* v. *John T. Clark & Son of Boston,* 539 F.2d 264, 269 (1976). We are not dealing here with any question as to the time, place or circumstances of the accident, to which the presumption of coverage may be properly applied. Rather, we must meet a primary issue of jurisdiction to entertain the claim. See *Employers Mutual Liability Ins. Co. of Wisconsin* v. *Arrien,* 244 F.Supp. 110, 113 (N.D. N.Y. 1965). The presumption is thus not apropos.

With respect to maritime employment, the Act focuses primarily on occupations *Northeast Marine Terminal Co.* v. *Caputo,* —— U.S. ——, 6 BRBS 150, 165 (Nos. 76-444 and 76-454, June 17, 1977). Unquestionably, Claimant was not a longshoreman, ship repairman, shipbuilder, or shipbreaker. Nor could he be classified as a harbor worker, since his work did not in any way pertain to operation of commercial vessels within a port or harbor area. *Anderson* v. *McBroom Rig Building Service,* 5 BRBS 713 (April 17, 1977).

Absent the presumption of Section 920(a), I find nothing in Claimant's occupation as a wire lather, or in his function on the project in question, that entails maritime employment. The fact that he worked upon navigable waters qualifies him with respect to situs, but falls far short of meeting the requirements of status. The fact that he boarded a barge two or three times a week to assist in

the transfer of steel rods for installation in caissons or beams does not, in my view, alter the nature of his occupation. I am constrained therefore to conclude that the claim does not come within the coverage of the Act.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the claim of the Claimant be and the same hereby is rejected.

/s/ ROBERT J. FELDMAN
ROBERT J. FELDMAN
Administrative Law Judge

Dated: August 11, 1977
Washington, D.C.

[Stamp—AUG 19 1977]

APPENDIX I

Statutory Provision Involved

§ 902. Definitions

When used in this chapter—

. . . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

. . . .

Appendix I

SUBCHAPTER I--RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

Supreme Court, U. S.
FILED
NOV 21 1980
MICHAEL RODAK, JR., CLERK

Nos. 80-651 and 80-639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-651

RONALD FUSCO,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

No. 80-639

BERNARD SULLIVAN,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

(Cover continued on reverse side.)

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(10344)

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari filed by Ronald Fusco was timely within the meaning of Section 2101 (c) of Title 28, United States Code and Rule 20 of the Rules of this Court.

2. Whether a worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected, is a "maritime employee" within the meaning of Sec. 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. Sec. 901 et seq. (1970 & Supp.V 1975).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-651

RONALD FUSCO,

Petitioner,

- v.-

PERINI NORTH RIVER ASSOCIATES and
HARTFORD ACCIDENT and INDEMNITY CO.,

Respondents.

No. 80-639

BERNARD SULLIVAN,

Petitioner,

- v.-

PERINI NORTH RIVER ASSOCIATES and
HARTFORD ACCIDENT and INDEMNITY CO.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Perini North River Associates and Hartford Accident and Indemnity Company, respectfully request that this Court deny the petitions for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 622 F.2d 1111.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1980. On August 19, 1980, the Second Circuit denied Petitioner Sullivan's timely Petition for Rehearing and Rehearing En Banc. Petitioner Fusco did not seek a rehearing before the court below. Sullivan filed the instant Petition for Certiorari on October 20, 1980. Fusco filed his Petition for Certiorari on October 17, 1980.

Both petitioners invoke the jurisdiction of this Court under 28 U. S. C. Sec. 1254 (1). Respondents argue in Point I, infra at 3-10 , that Fusco's petition was not filed within the time limitations prescribed in 28 U. S. C.

Sec. 2101 (c), and is therefore jurisdictionally defective.

STATUTORY PROVISIONS INVOLVED

Section 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Sec. 902(3) (1970 ed. & Supp. V) is set forth as Appendix I, at A-103, of Fusco's petition.

Title 28, U.S.C. Sec. 2101 (c) states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. Sec. 2101 (c) (1976).

REASONS FOR DENYING THE WRITS

POINT I

THE PETITION FOR A WRIT OF CERTIORARI FILED BY RONALD FUSCO WAS NOT TIMELY WITHIN THE MEANING OF SECTION 2101(c) OF TITLE 28, UNITED STATES CODE, AND IS THEREFORE JURISDICTIONALLY DEFECTIVE, AND SHOULD BE DENIED.

Section 2101(c) of Title 28, United States Code, provides that in a civil case, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment below. 28 U.S.C. Sec. 2101(c) (1976). This Court has held that, with respect to civil cases, the untimely filing of a petition for certiorari is considered to be a jurisdictional defect. See: Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942); Matton Steam-

boat Co. v. Murphy, 319 U.S. 412 (1943); Deal v. Cincinnati Board of Education, 402 U.S. 962 (1970).

The judgment of the court below in Fusco v. Perini North River Associates, 622 F. 2d 1111 (2d Cir. 1980) was entered on June 4, 1980. Petitioner Fusco filed neither a petition for rehearing, nor any other application for post judgment relief with the court below, which would toll the 90 day time limitation set forth in 28 U.S.C. Sec. 2101(c). See: Sup. Ct. R. 20.4; Department of Banking of Nebraska, 317 U.S. at 266. On October 17, 1980, Petitioner Fusco filed a petition for a writ of certiorari with this Court, docket number 80-651. Respondents respectfully submit that Fusco's failure

to file his petition until 135 days after the entry of the judgment below renders the petition for a writ of certiorari jurisdictionally defective.

Respondents are aware that a petition for rehearing of the Second Circuit's decision in Fusco, supra, was timely filed by Petitioner Bernard Sullivan. That petition for rehearing was denied by the Second Circuit Court of Appeals on August 19, 1980. Accordingly, Sullivan's petition for a writ of certiorari, docket number 80-639, filed on October 20, 1980, was timely. However, Respondents contend that the 90 day period within which Fusco could petition this Court for a writ of certiorari is not tolled by the filing of a petition for rehearing by Sullivan.

Supreme Court Rule 20.4 provides, in relevant part, that

> if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

Respondents contend that Petitioners Fusco and Sullivan are not parties in the same case, and therefore, the petition for a writ of certiorari filed by Fusco remains untimely, despite the timely petition for rehearing filed by Sullivan.

Claimants Fusco and Sullivan each sustained accidents while employed by Perini North River Associates on the

same construction project. Since these and other pending cases involved common questions of law and fact, the Benefits Review Board consolidated the cases for the purposes of these appeals. Sedmak v. Perini North River Associates, 9 BRBS 378, 380 (1978). (See Petitioner Fusco's Appendix F at A-39). Subsequently, by order dated February 15, 1979, the United States Court of Appeals for the Second Circuit granted a motion to consolidate the petitions for review filed by Ronald Fusco, Bernard Sullivan and the Director, Office of Workers' Compensation Programs, United States Department of Labor. (See Appendix A at A-1, A-2). However, this Court has held that a consolidation, "does not merge the suits into a single

cause, or change the rights of the parties, or make those who are parties in one suit parties in another." Johnson v. Manhattan Railroad Co., 289 U. S. 472 (1933) (emphasis added). Rather, consolidation is permitted as a matter of convenience and economy in judicial administration.

Similarly, in his treatise on federal practice, Professor Moore states that in a consolidated case, "[t]he actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action." 5A Moore's Federal Practice, Par. 42.02, at 42-22 (2nd ed. 1980).

In Cole v. Schenley Industries, Inc., 563 F. 2d 35 (2d Cir. 1977), the

Court of Appeals for the Second Circuit considered the effect of a consolidation on the jurisdictional basis of four actions brought in federal court. In that matter, four separate suits challenged the merger of two companies. The four actions were consolidated by the District Court Judge. Citing Johnson, supra, the Court of Appeals stated that "consolidation cannot effect a merger of the actions or the defenses of the separate parties. It does not change the rights of the parties in the separate suits." 563 F.2d at 38. The court then proceeded to consider the jurisdictional basis of each complaint separately. See also: Greenberg v. Giannini, 140 F. 2d 550 (2d Cir. 1944).

Respondents respectfully submit

that, although the petitions of Fusco and Sullivan have been consolidated in the court below, each action retains its separate identity. Therefore, Fusco and Sullivan are not parties to the same case, within the meaning of Rule 20.4 of the rules of this Court. Accordingly, the filing of a petition for rehearing by Sullivan does not toll the time requirements of Section 2101 (c) with respect to Petitioner Fusco and consequently his petition for a writ of certiorari is jurisdictionally defective and should be denied.

POINT II

THE DECISION BELOW IS CONSISTENT WITH THE INTERPRETATION OF SECTION 2(3) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, MANDATED BY THIS COURT IN P. C. PFEIFFER CO. V. FORD.

The Supreme Court previously vacated the judgment of the Second Circuit in Fusco v. Perini North River Assoc., 601 F. 2d 659 (2nd Cir. 1979), and remanded the matter for further consideration in light of P. C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979). Perini North River Assoc. v. Fusco 444 U.S. 1028 (1980).

Upon remand, the Second Circuit concluded with regard to the "maritime employment" test of Sec. 2(3):

> ....[W]e read the opinion [of the Supreme Court in P. C. Pfeiffer Co. v. Ford, supra] as pre-

> cluding any application of the LHWCA, as amended in 1972, to any employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

622 F. 2d 1111, 1113 (1980). On this basis, the court below denied the petitions of Fusco and Sullivan, holding that:

> In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant.

622 F. 2d at 1113.

The decision below is entirely consistent with the opinion of this Court in P. C. Pfeiffer, supra. In that matter, this Court rejected a geographic interpretation of the phrase "maritime employ-

ment", stating that this analysis "is plainly inconsistent with the language and structure of the 1972 Act". 444 U.S. at 78. Rather, it was held that "maritime employment" embodies an occupational concept focusing upon the nature, not the location, of employment. 444 U.S. at 78, 83.

Petitioners have urged this Court to limit the occupational status test set forth in P. C. Pfeiffer to injuries occurring only upon the shoreside areas enumerated in amended Sec. 3(a) of the Act. They urge that construction workers injured upon pre-1972 navigable waters are covered under the amended Act solely by virtue of their geographical location, or by virtue of their alleged prior coverage under the 1927 Act.

There is considerable doubt whether Fusco and Sullivan were in fact injured on pre-1972 navigable waters (as they argue in their petitions) or on the substructure under construction itself. If the latter is the case, then any argument for coverage premised solely upon the location of injury over pre-1972 navigable waters must obviously fail.

The Administrative Law Judges and the Benefits Review Board found it unnecessary to distinguish between pre-1972 and post-1972 navigable waters. In its original decision, in which the court below adopted the now discredited "geographical interpretation" of "maritime employment", the court felt compelled to make findings of fact to the effect

that petitioners were injured upon pre-1972 navigable waters. 601 F. 2d 659, 663. However, in its decision upon remand, and after considering the mandate of this Court in P. C. Pfeiffer v. Ford, the Second Circuit found it unnecessary to make any distinction between navigable waters as defined before and after the 1972 Amendments to the Act. 622 F. 2d at 1113.

In fact, Fusco states in his petition that on January 8, 1975 while assisting a group of dockbuilders on the pier, he fell while descending a ladder from atop the grillage above the forms, to the bottom of the form. See: Fusco's Petition at 13-14. Certainly, Fusco's own statement shows that he was injured on the substructure, and not on pre-1972

navigable waters.

In Sullivan's case, the only relevant finding made by the trier of fact was that claimant was standing about 12 inches above the water at the time of accident (Fusco Appendix B at A-99). In testimony, however, it was established that Sullivan was injured on the substructure, above the water, while installing beams which ran from caisson to caisson. (Transcript of Administrative Law Judge hearing, January 19, 1977, at 10).

The evidence supports the conclusion that petitioners were not injured over pre-1972 navigable waters, as their accidents occurred on a structure permanently affixed to the land. Therefore, prior to 1972, petitioners would not have been entitled to benefits under the Act. Nacirema Operating Co. v.

Johnson, 396 U.S. 212 (1969).

In any event, there is no statutory foundation on which to conclude that the status test of "maritime employment" is to be applied only to those injuries involving construction workers on the shoreside situs. If the Court determines that a worker injured over pre-1972 navigable waters is eligible for benefits, solely by virtue of the situs of injury - and without an inquiry into the claimant's occupation - two disparate tests of eligibility result: one occupational test for shoreside employees and another geographical analysis for employees injured over 1927 navigable waters.

This geographical distinction, creating two "maritime employment" tests pursuant to Sec. 2(3), was clearly

renounced in Pfeiffer, in which it was determined that "[t]he use of the term 'maritime employment' in Sec. 2(3), therefore, provides no support for the proposition that the statutory definition of an employee imports a geographic limitation narrower than the one defined in Sec. 3(a)." 444 U.S. at 78.

Section 2(3) states in part, that "[w]hen used in this Act . . . the term employee means any person engaged in maritime employment . . . " 33 U.S.C. 902(3). (Emphasis supplied). This definition permits no license to distinguish among employees injured on any situs noted in Sec. 3(a). "To be eligible for compensation, a person must be an employee as defined by Sec. 2(3) who sustains injury on the situs defined by Sec. 3(a)."

Pfeiffer, 444 U.S. at 74.

As the Supreme Court stated in Pfeiffer, Congress intended to apply a simple, uniform standard of coverage. 444 U.S. at 83.

In addition, contrary to petitioners' assertions, coverage under the 1927 Act provides no basis for coverage under the Act as amended in 1972. By affirmatively describing the classes of workers contained in the Sec. 2(3) definition of "employee", Congress has indeed withdrawn coverage from those individuals, such as construction workers, who otherwise might have been covered under the 1927 Act solely by virtue of the situs of injury.

This Court in P. C. Pfeiffer, supra stated that:

> [t] he Act, . . . contains distinct situs and status requirements. The situs test of Sec. 3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the Jensen line. This test defines the broad geographic coverage of the Act. Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment". This section defines the Act's occupational requirements. The term "maritime employment" refers to the nature of a worker's activities.

444 U.S. at 78. (emphasis added).

Assuming, arguendo, that Petitioners Fusco and Sullivan would have been covered under the 1927 Act, they must now satisfy the "maritime employment" test of Sec. 2(3) - a prerequisite to coverage not previously demanded of the particular claimant. Northeast Marine Terminal Co. v. Caputo,

432 U.S. 249, 264 (1977) 1/

In Weyerhauser Co. v. Gilmore, 528 F. 2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), the court termed the assertion that anyone covered under the Act prior to the 1972 Amendment must indeed be permitted to come within its protection subsequent to the Amendments, "an exercise in judicial legerdemain". 528 F. 2d at 960-1.

To the extent that construction workers were covered prior to 1972, such

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1/ Professor Larson, in his treatise on Workers' Compensation Law stated,

> . . . that the expansion of the Act took place solely in the enlargement of "situs" covered. The addition of the "status" test is not an expansion but a contraction.

4 Larson, Workmen's Compensation Law, Sec. 89.27 at 16-181 (1980).

coverage was due to the strict situs rule announced by this Court in Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962). Clearly, construction workers employed over pre-1972 navigable waters were never themselves considered to be in "maritime employment". In Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952), this Court flatly stated that not all persons covered under the 1927 Act were engaged in "maritime employment".

> If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime'.

344 U.S. at 341-342.

Of particular importance is the

collection of cases made by the Court which "deal with various types of construction and service workers, obviously not themselves engaged in traditional 'maritime employment', if one were to look solely to the particular type of job they were engaged for." 344 U.S. at 341. (emphasis added).

For petitioners to be covered solely by virtue of their alleged prior coverage under the 1927 Act, it would be necessary to define the "maritime employment" test of Sec. 2(3) geographically when used in reference to workers injured over pre-1972 navigable waters and occupationally when applied to workers injured upon the expanded post-1972 navigable waters. As stated previously at page 17 , supra, the Act and the

cases do not sanction the application of the two separate tests of "maritime employment" based upon situs of injury.

"Maritime employment" as used in Sec. 2(3) of the Act requires a single, uniform, occupational test, regardless of where the claimant is employed within the Sec. 3(a) situs. Caputo, supra, 432 U.S. 249, 272.

This Court stated in P. C. Pfeiffer, supra, "[w]e decline the invitation to construe 'maritime employment' so as to create two differing situs requirements in a single sentence." 444 U.S. at 79. To hold that any employment over 1927 navigable waters is a sufficient basis for coverage would be to read Sec. 2(3) out of the Act. Id., Weyerhauser Co. v. Gilmore, supra, 528 F. 2d at 961. Such legislative revision is most appropriately left to Congress.

POINT III

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE CIRCUIT COURTS WHICH HAVE CONSIDERED THE ISSUE OF "MARITIME EMPLOYMENT" UNDER SEC. 2(3) OF THE ACT.

By adopting an occupational status test, the Second Circuit determined that petitioners' work must "bear a significant relationship to navigation or to commerce on navigable waters" in order to be eligible for benefits under the Act. Fusco v. Perini North River Assoc., 622 F. 2d 1111, 1113. The standard employed by the court below is consistent with that adopted by every Circuit which has considered the issue of maritime employment under Sec. 2(3). See: Stockman v. John T. Clark and Son of Boston, 539 F. 2d 264, 271, 276

(1st Cir. 1976), cert. denied, 433 U.S. 908 (1977); Sea-Land Serv. v. Dir., Office of Wkrs.' Comp., 540 F. 2d 629 (3rd Cir. 1976); Conti v. Norfolk & W. Ry., 566 F. 2d 890, 895 (4th Cir. 1977); I.T.O. Corp. of Baltimore v. Benefits Review Board, 529 F. 2d 1080 (4th Cir. 1975), modified en banc on other grounds, 542 F. 2d 903 (4th Cir. 1976), vacated and remanded sub nom., Adkins v. I.T.O. Corp. of Baltimore, 433 U.S. 904 (1977), rev'd on remand, 563 F. 2d 646 (1977); Thibodoux v. Atlantic Richfield Co., 580 F. 2d 841 (5th Cir. 1978), cert. denied 442 U.S. 909 (1979); Weyerhauser Co. v. Gilmore, 528 F. 2d 957, 959-60 (9th Cir. 1976), cert. denied, 429 U.S. 868 (1976).

Petitioners cite Odom Constr. Co.,

Inc. v. U. S. Dept. of Labor, 622 F. 2d 110 (5th Cir. 1980) as an example of a conflict among the circuits.

Although normally a construction worker, on the day of injury, claimant was engaged in a two day job that required moving four large concrete blocks that had been located on the bank of a navigable canal but had sunk into the water because of erosion. The blocks were used solely as a place to tie off or moor barges that were waiting to be moved to loading facilities, and loaded barges awaiting tow boats. 622 F. 2d at 112.

The Fifth Circuit concluded that this activity on the day in question was maritime work. 622 F. 2d at 112. Citing the exact standard adopted in

Weyerhauser Co. v. Gilmore, supra, the court held that the job being done clearly had "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . .,". Odom Constr. Co., 622 F. 2d at 113. The court below likewise cited Weyerhauser, supra, with approval. Fusco, 622 F. 2d at 1113. Obviously the work involved in Odom, supra, facilitated navigation and commerce on navigable waters.

Petitioner's reliance on Brown and Root, Inc. v. Joyner, 607 F. 2d 1087 (4th Cir. 1979), cert. denied, _____ U.S. _____, 100 S. Ct. 2960 (1980), in support of a "conflict among the circuits" is equally misplaced. In that matter, the Fourth Circuit was careful

to note "that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." 607 F. 2d at 1090. The claimant's activities in Brown and Root, were the construction of a dry dock, which, the court emphasized, is peculiarly a maritime facility. 607 F. 2d at 1089. Claimants' activities in the instant case involved the construction of a sewage treatment plant, clearly without relationship to navigation and commerce over navigable waters.

P. C. Pfeiffer, supra, mandates an inquiry into the factual circumstances surrounding the individual employee's work activity. 444 U.S. at 78. Since the Circuits have adopted a legal standard

requiring a nexus between a claimant's work and maritime activities involving navigation and commerce on navigable waters, it is clear that the alleged "conflicts" with the decision below refer simply to differing results dependent upon the particular factual circumstances of each case. It is respectfully submitted that the decision from which review is sought herein turns solely upon questions of fact, and is thus not a proper subject for review by this Court. United States v. Johnston, 268 U. S. 220, 227 (1925).

POINT IV

THE COURT BELOW ANALYZED THE WORK ACTIVITIES OF PETITIONERS IN ACCORDANCE WITH THE MANDATE OF THIS COURT AND CORRECTLY CONCLUDED THAT THEIR ACTIVITIES DO NOT BEAR A SIGNIFICANT RELATIONSHIP TO NAVIGATION OR TO COMMERCE ON NAVIGABLE WATERS.

Petitioner Fusco was described by Administrative Law Judge Lesser as a construction laborer who assisted in the construction of a substructure of a sewage disposal plant, performing such tasks as fetching materials from barges or from the shore, assisting in the driving of caissons into the river bed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct platforms across the beams. (Petitioners' Appendix G at A-89).

Administrative Law Judge Feldman found that Sullivan was employed as a wire lather whose principal duties were the steel reinforcement of concrete. Sullivan was directly involved in building and filling caissons with steel reinforcing rods and concrete; and reinforcing horizontal beams hanging over the water from caisson to caisson. (Petitioners' Appendix H at A-99). Sullivan's argument, that he was engaged in longshoring operations because he occasionally unloaded construction material from barges at the job site, was categorically rejected by the Administrative Law Judge (Petitioners' Appendix H at A-101-102); the Benefits Review Board (Petitioners' Appendix F at A-45); and the Second Circuit (Petitioners' Appen-

dix B at A-7).

While necessarily conceding that they are construction workers by occupation, petitioners argue at length that they satisfy the "maritime employment" test because a sewage disposal plant was to be erected upon the concrete substructure they were building. They urge that the sewage disposal plant - which Perini North River Associates has not contracted to build, and which is, in fact, not yet built - would ultimately alleviate pollution in the Hudson River, thereby providing for the protection of fish, shellfish and wildlife and providing for recreation in and on the water. See, Fusco petition at 27; Sullivan petition at 32.

When it considered this argument,

the court below stated that "[i]t is not significant that the plant was being constructed so that sewage would not cause pollution of navigable waters". 622 F. 2d at 1113.

Clearly, navigation and commerce will continue on the Hudson River regardless of whether pollution is reduced. Longshoremen and other workers enumerated in Sec. 2(3) of the Act will continue to perform their usual duties with or without a sewage treatment facility. Certainly, any claimed effect upon seamen or fishermen - not covered occupations - or fish, shellfish and wildlife, has no relevance to questions of coverage under the Act. The record does not support the proposition that reducing pollution aids navigation.

Further, the relationship between the construction of a substructure and the operation at a sewage treatment facility is untenable. Assuming, arguendo, that there were some maritime purpose attributable to a sewage treatment plant yet to be built, agreements to provide mere facilities for navigation are not maritime. Massman Construction Co. v. Bassett, 30 F. Supp. 813,815 (E.D. Miss. 1940), rev'd on other grounds, 120 F. 2d 230 (8th Cir. 1941), cert. denied, 314 U.S. 648 (1941). Also, it is simply incorrect to state that a sewage treatment facility could eliminate pollution in the Hudson River only by being erected upon navigable water. (See Fusco petition at 28). It is contemplated that the sewage

treatment facility will dispose of raw sewage from the west side of the City of New York, and not treat the waters of the Hudson River. (Transcript of Administrative Law Judge hearing, December 15, 1976, at 122-123). There is no evidence in the record showing that raw sewage must be treated over navigable waters.

The court below applied the occupational status test described in P. C. Pfeiffer, 444 U.S. at 82, and scrutinized the work activities of each petitioner. The court concluded that "the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters." 622 F. 2d 1111, 1113. Manifestly, the Second Circuit was correct when it stated that:

> The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept - a foundation precluded by the reasoning in the Ford case.

622 F. 2d 1111, 1113.

CONCLUSION

FOR THESE REASONS, THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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November 17, 1980

APPENDIX

Appendix A

A-1

Order of the United States Court of Appeals for the Second Circuit granting the motion to consolidate the appeals of Ronald Fusco, Bernard Sullivan and the Director, Office of Workers' Compensation Programs, Department of Labor

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of February, one thousand nine hundred and seventy-nine.

In the Matter of RONALD FUSCO,
Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR, (Benefits Review Board, PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

It is hereby ordered that the motion made herein by counsel for the petitioner dated February 6, 1979 for leave to

consolidate the petitions for review in Docket Nos. 79-4006, 79-4015 and 79-4016
be and it hereby is granted.

/s/ Murray I. Gurfein

Circuit Judge

sec 0

sec 36